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ELEMENTS OF CONVEYANCING

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BY

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AND

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WITH WHICH IS INCORPORATED

STUDENTS' PRECEDENTS IN CONVEYANCING

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PREFACE

TO THE THIRD EDITION.

This edition has been brought up to date and has been very largely extended.

An attempt has been made to include in one volume of reasonable compass the law as to the contract of sale and the conveyance of land. Hence, the portion on contracts for the sale of land has been practically rewritten, considerable additions have been made to the chapters on mortgages and settlements, a section has been added on the Settled Lands Acts, and also a new chapter on conveyance by registration.

The precedents have been revised and a few added.

The precedents are based on those in "Key and Elphinstone's Compendium" and "Davidson's Concise Precedents," and the present Editor desires to repeat the acknowledgment made in the last edition of "Clark's Students' Precedents" for permission to use these works. In the chapters on contract of sale and

conveyancing, considerable use has been made of "Williams on the Law of Vendor and Purchaser" and "Elphinstone's Conveyancing"; and the reader is referred to those books for further details of what is here treated of in an elementary manner for students.

CUTHBERT SPURLING.

11 New Court,
W.C.2.
September, 1920.

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ADDENDUM.

On page 73 it should be added that although the Finance Act, 1920, enacts that increment value duties shall cease to be chargeable, it is still necessary for the purchaser's solicitor to see that the conveyance bears a "particulars delivered stamp." A form giving the particulars of the conveyance is handed by the vendor's solicitor to the purchaser's solicitor on completion, and this is handed in by the purchaser's solicitor when he goes to stamp the deed. The "particulars delivered" and the duty stamp are thus impressed at the same time.

INTRODUCTION TO CONVEYANCING.

CHAPTER I.

OF THE HISTORY OF CONVEYANCING.

It is proposed in this Introduction to Conveyancing to try and explain the way in which the simplest forms of the principal conveyancing instruments are prepared. And in order to facilitate the comprehension of this study, it will be prefaced with a brief account of the history of conveyancing; so that the reader may understand the reasons for the changes which have been made, from time to time, in the various forms of assurance which we are about to consider.

Assurances of copyholds.

Land may, with reference to its tenure, be regarded as being either freehold or copyhold. Copyhold land is still transferred by the primitive method of surrendering it to the lord of the manor, who, in his turn, re-grants it to the tenant's nominee. The surrender may be made either in Court or out of Court. If made in Court, it is entered on the manor roll and a copy of the roll relating to the surrender and admittance is given to the purchaser. If made out of Court, a memorandum of surrender is made and signed by the parties and the steward of the manor. The steward then enters such surrender on the Court Rolls. The grantee can then claim admittance. A fine is usually paid to the lord on the admittance. The title of the grantee arises upon his admittance, but relates back to the date of the surrender. No presentment of the surrender to the Court prior to enrolment is necessary (*a*).

(*a*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 84.

Estates in land of freehold tenure divisible into freeholds in possession; reversions and remainders; and terms of years.

As to land of freehold tenure, the estates held in it may be either freehold or leasehold, the former again being divisible into those in possession and those in reversion or remainder, which may be placed, with reference to their mode of conveyance, in a class by themselves. We have, then, to consider the history of the assurances which relate to these divisions of freehold land. And since the principal changes introduced into conveyancing arose soon after, and in consequence of, the passing of the Statute of Uses (*b*), our three classes of property may, for this purpose, be conveniently treated of with reference to—1st, The manner of acquiring, and dealing with, them, before the passing of the statute; 2nd, The changes and modifications in conveyancing introduced shortly after that date; and 3rd, The further alterations in this respect made since the passing of the statute down to the present day.

Assurances before the Statute of Uses.

The right of alienating the various kinds of property which have been mentioned had been a thing of slow growth, and was subject to several restrictions, derived chiefly from the rules of feudal tenure. A consequence of this was, that the earlier forms of assurance were few in number, and comparatively simple in operation.

Feoffment with livery of seisin.

The earliest, and most important, form of conveyance was a Feoffment, accompanied by Livery of Seisin. This was employed for the creation of all estates of freehold in possession, and for the transfer of such of them as were alienable; namely, estates in fee-simple, or for life. A Feoffment was a formal statement by the feoffor, or owner of the estate, that he gave it to the feoffee, and was completed by the feoffor's publicly putting the feoffee into possession of the land which he was to hold.

This public putting into possession, called Livery (delivery) of the Seisin, or feudal possession of the land, was either " in deed " or " in law " according as it took place on,

(*b*) 27 Hen. VIII. c. 10.

or in sight of, the land (*c*). It was essential that the feoffment and livery of seisin should be made simultaneously; and such a mode of assurance was, therefore, in general, applicable only to the creation of an estate which took effect in possession. It might, however, be employed for the creation of any remainder limited after an estate of freehold, and of a vested remainder although limited after a term of years, since the grant of a term did not transfer the feudal seisin to the termor. In such a case, livery could be made either to the lessee, to take effect for the benefit of the remainder-man (*d*); or to the latter himself, provided the lessee gave his consent (*e*). As early as the Conquest (*f*) it had become usual to embody the terms of a feoffment in a deed, or charter; but for a long time afterwards this was not essential, and a deed, if made, was only evidence of the transfer, and did not, of itself, pass any estate. It should here be mentioned that, after a time, the name "Feoffment" was applied only to an instrument conferring a fee-simple, that which gave an estate tail, or one for life, being called either a Gift, or a Demise or Lease, as the case might be (*g*); but since the form of words used was, as nearly as possible, the same, and livery of seisin was requisite in every case, it will be sufficient if we associate the word "feoffment" with the grant of an estate of freehold in possession; remembering at the same time that an estate tail could only be created, and not transferred, by it.

Feoffment sometimes accompanied by a deed.

But this not essential.

Gift and demise.

So great was the importance attached to a feoffment and livery of seisin, that it might have the effect of transferring an estate greater than that possessed by the transferor. Thus, if the tenant, in actual possession, of an estate less than a fee-simple purported to convey a fee-simple by feoffment and livery of seisin, his grantee did actually acquire the last-mentioned estate; subject, however, to the right of re-entry or action of the lawful tenant. Such a feoffment was said to have a "tortious" operation, because it con-

Tortious operation of a feoffment.

(*c*) Co. Litt. 48a.
(*d*) 2 Bl. Com 166.
(*e*) Co. Litt. 48b, n. (8).
(*f*) Mad. Form. Ang. i., ii.
(*g*) 2 Bl. Com 316.

veyed an estate wrongfully; and if made by a tenant for life, or for years, caused a forfeiture of the estate of the wrong-doer.

Grant.

Although remainders might be created by feoffment and livery of seisin, neither they nor reversions could be transferred by this process except in the case of a reversion or vested remainder expectant on the determination of a term of years; the owner of such a future estate having already the seisin of the land. And even as to these estates it would seem that when the lessee had entered on the land, and was therefore in actual possession, the better way of passing the freehold was by the conveyance next to be considered (*h*).

Lying in grant and lying in livery.

Livery of seisin, then, being, in general, inapplicable to the alienation of estates in reversion or remainder, other means were resorted to, in order to obtain as much notoriety as possible for their transfer. With this object, it was required that they should be conveyed by a Deed of Grant, followed by the delivery of the deed to the grantee. By this means the precise nature and amount of the property to be transferred was clearly ascertained, and since the execution and transfer of the deed operated as a transfer of the property comprised in it, reversions and remainders were said to "lie in grant" in distinction to estates in possession, which were said to "lie in livery." It was also necessary that the reversioner or remainder-man should obtain the attornment, or formal consent, of those tenants whose estates preceded his own.

Lease.

We have next to mention a lease, which was the mode of granting a term of years. Terms of years, being of little value in early times, could be originated by mere word of mouth, without any ceremony or writing; their creation, therefore, calls for no remark, but it is to be remembered that a lease was never perfect until the lessee had actually taken possession of the land demised. For up to that time

Entry by lessee was necessary.

(*h*) *Doe* v. *Cole*, 7 B. & C. 243, 248.

he had only an *interesse termini* or right of entry. But after entry he was capable of taking a conveyance of the reversion or remainder by deed alone, without any livery of seisin. A lease, moreover, might always be granted to commence at some future time, since the grant of a term of years does not, as we have seen, affect the feudal seisin of the land.

Assignment.

Closely connected with a lease is an Assignment, which is the transfer of the entirety of a term of years, and has the effect of putting the assignee in the place of the former lessee, and making him at once liable to all the obligations of the lease, although he may not have entered on the land. Like a lease it required no ceremony or writing, for its validity (*i*).

Exchange and Partition.

The next modes of transfer to be stated are an Exchange and a Partition. An exchange was, as its name implies, the gift of one estate or interest, in consideration of receiving another. It might be made of estates in possession, or of those in reversion or remainder; but it was essential that the property exchanged should be of the same kind, although not necessarily of the same value (*j*): thus a fee-simple could only be exchanged for another fee-simple, and not for an estate for life, or for years.

No livery of seisin was necessary, even when the estates exchanged were freeholds in possession (*k*); for since each owner simply changed places with the other, and each had, already, possession of his land, the transaction was made notorious without livery, especially as an exchange of estates in possession was not complete until perfected by the actual entry of both parties on their new lands. If the property exchanged consisted of estates not in possession, then a deed was necessary to make the transaction valid.

A Partition might be employed for the division of an estate between coparceners, joint-tenants, or tenants in common;

(*i*) *Noke* v. *Awder*, Cro. Eliz. 373, 437. (*j*) Co. Litt. 51a.
(*k*) 2 Bl. Com. 323.

but for the first two purposes (that is, partition between coparceners and joint-tenants) a release (to be presently noticed) was the more usual form of conveyance. Livery of seisin was necessary in every case of a partition, and if the partition was made between joint-tenants, or tenants in common, a deed was also necessary (*l*).

Release.

Another form of conveyance was a Release. This was used to convey a right in land to the owner of some existing estate in possession, whereby his estate became enlarged; as by adding a reversion or remainder to an estate for life, or for years; or by passing an undivided share in land to a joint-tenant. In both these cases it was necessary that there should be privity of estate between the relessor and the relessee. By "privity of estate," is meant that their estates must be so related to the other as to make but one and the same estate in law (*m*). The estate of the relessee being already in possession, no livery of seisin was necessary, but a deed was required in every case of an express release by act of parties. A release, preceded by a lease, was occasionally used to convey a fee-simple, by first granting a lease for a short term to an intending purchaser, and immediately afterwards releasing the reversion to him. But since it was necessary that the lessee should have actually entered on the land to be conveyed, as much notoriety was given to this mode of transfer as to a feoffment.

Surrender.

A Surrender was the converse of a release, being the yielding up of an estate in possession by its owner, with a view to its being merged in a greater (*n*). In this case, as in that of a release, it was essential that there should be privity of estate between the parties, but a surrender differed from a release in not requiring any deed or writing for its validity.

Defeasance.

Lastly, we have to notice a Defeasance, which was a collateral deed made at the same time as a feoffment or other

(*l*) 2 Bl. Com. 324.
(*m*) *Ibid.* 325.
(*n*) Co. Litt. 337b.

conveyance, and containing certain conditions, on the performance of which the estate then created might be defeated (*o*). It was in this manner that mortgages were usually made, but we may perhaps anticipate a little on this point by saying that after the passing of the Statute of Uses it became customary to insert the conveyance of an estate, and any conditions to which the conveyance was made subject, in the same deed; and thus separate deeds of defeasance have long fallen into disuse (*p*).

Common Law conveyances.

Are original or primary.

Or derivative or secondary.

All the above-mentioned methods of dealing with land are called Common Law Conveyances, because they operate without reference to the Statute of Uses. They may also be divided into original or primary, and derivative or secondary, conveyances; the latter being those which presuppose some originating instrument, and only serve to transfer interests previously created. Thus, a feoffment, lease, exchange, and partition were original conveyances, an assignment, a release, surrender, and defeasance were derivative; whilst a grant was either original or secondary, according to the nature of the property conveyed.

Extraordinary assurance.

Fine and Recovery.

Besides the above, which, together with those subsequently introduced in consequence of the Statute of Uses, are called ordinary assurances, there was the method used for converting an estate tail into a fee-simple, and thus rendering it alienable. This, which was called an extraordinary assurance, was a Fine and Recovery, of which we need not say more than to remind the reader that it was a pre-arranged suit between the tenant in tail, as defendant, and a friendly plaintiff, in which the latter was declared owner in fee-simple of the lands entailed; and was enabled, in consequence, to deal with them in any way which the tenant in tail might desire.

There were also two other forms of assurance which did not derive their force from the Common Law. Before the pass-

(*o*) 2 Bl. Com. 327.
(*p*) See *Cotterell* v. *Purchase*, Ca. t. Talb., 61, 64.

ing of the Statute of Uses, the Court of Chancery had recognised the custom of conveying land to some nominal owner, who was to hold it for the benefit of another person: and this enforcement by equity of secret uses frustrated the policy of the law, by enabling land to be transferred without any notoriety. Such a transfer could be effected by the employment of one of two instruments, named respectively a Covenant to stand Seised and a Bargain and Sale; the former being a deed by which a man covenanted to stand seised of land to the use of a wife, child, or kinsman: the other, a contract whereby the bargainor, for some pecuniary consideration, undertook to convey land to the bargainee. For since the Court of Chancery would enforce the use raised by these means, the covenantee or bargainee acquired the practical ownership of the land. These assurances were said to operate without transmutation of possession, as opposed to those which transferred a legal estate, and were therefore said to operate by transmutation of possession. The distinction still remains in name, although the Statute of Uses has, to use the words of Coke, "married uses to the law," and assurances operating without transmutation of possession are now, therefore, those declaring a use only, so that the legal estate passes by virtue of the Statute of Uses, *i.e.*, a Bargain and Sale enrolled and a Covenant to stand Seised.

Covenant to stand seised.

Bargain and Sale.

It was in order to put a stop to these secret uses that the Statute of Uses (*q*) enacted that the *cestui que use* should be deemed to be in lawful seisin, estate, and possession of the estate held to his use. In this object it failed, owing to the peculiar view which the Courts of Law continued to take of trusts. But it made several important changes in the form of conveyancing instruments, and to these changes we will next turn our attention. The first and most general of them was the introduction into conveyances of an express declaration of the way in which the use was to be limited: thus, instead of making a feoffment simple "to" A. and his heirs, it would now be made "unto and to the use of"

Changes in consequence of the Statute of Uses.

(*q*) 27 Hen. VIII. c. 10.

A. and his heirs, for by this means instruments were rendered effectual which might otherwise, from want of consideration, or from some omission or other imperfection, have failed to pass the legal estate in the land conveyed (*r*). Declaration of Use.

But a still more important novelty was the invention of a new form of conveyance, which almost totally superseded that notorious and public mode of transferring property which the common law required, and the statute intended to restore (*s*). A new form of assurance.

It will be recollected that, before the passing of the Statute of Uses, there were, besides the common law conveyances, two others, namely, the covenant to stand seised, and the bargain and sale, which served to raise a use although they did not, at that time, transmute the possession. But when the statute turned uses into possession, these assurances passed the legal as well as the equitable estate; and that without any necessity for livery of seisin or attornment. As regards the covenant to stand seised, this was not of much importance; for since no uses could be limited by it except to a child or near relation, the limitations to trustees, then necessary to support contingent remainders, could not be inserted in it, and consequently covenants to stand seised soon fell into disuse, and may be dismissed from our further notice.

But a bargain and sale now obviously presented a ready means of making secret transfers of land from any one person to another. For a bargain and sale still raised a use in favour of the purchaser, and now, under the Statute of Uses, the fact of land being held to his use gave him the legal estate in possession in it also. In order, therefore, to restore notoriety in the transfer of land, it was enacted by the 27 Hen. VIII., c. 16, called the Statute of Inrolments, that no hereditaments should pass from one to another, Bargain and sale.

Statute of Inrolments.

(*r*) *Samme's Case*, 13 Co. Rep. 54.
(*s*) Co. Litt. 271b, n. (1).

whereby any estate of inheritance or freehold should be made to take effect in any person, or any use thereof be made, by reason only of any bargain and sale thereof, except the same be made by writing, sealed, and inrolled within six months after execution. By this means, it was hoped, secret conveyances were made impossible; but the astuteness of the lawyers soon defeated the purpose of the law. For it was observed that the statute made mention only of estates of inheritance and of freeholds: a lease, therefore, for a term of years was exempt from its provisions. Now we have seen that if, before the statute, a lessee were in actual possession of the land demised, no livery of seisin was requisite to convey the remainder of the estate to him; and also, that if a man, in consideration of money paid to him, bargained that he would grant land to another, this raised a use in the bargainee. Then came the statute which enacted that a *cestui que use* should be deemed to be in actual possession of the land held to his use. If, therefore, a bargain were now made, for a pecuniary consideration, that a man should have land granted to him for one year, this was deemed to make him a lessee for a year in actual possession, and, as such, capable of taking a release of the remainder of the grantor's estate, without any livery of seisin, or other public ceremony.

Lease and Release.

From this sprung the conveyance known as a Lease and Release, which almost entirely superseded the ancient feoffment, and was, until lately, the ordinary way of conveying freehold estates of all kinds. The form of this assurance was, first an instrument stating that the vendor, in consideration of some nominal sum had bargained and sold the land to the purchaser for one year, to commence from the day previous to the date of the deed, to the intent that the purchaser might thereby, and by the statute for transmuting uses into possession, be in actual possession of the premises, and enabled to accept a grant of the reversion of the same. This was followed by a second deed releasing the reversion to him, and thus putting him into possession of the whole estate intended to be conveyed.

The Lease and Release, then, came to be the almost universal way of conveying freeholds, and was employed for the purpose of making an exchange or partition, as well as for conveyances between ordinary vendors and purchasers. Incorporeal hereditaments, proper, continued to be created and transferred by Deed of Grant, whilst of the other assurances previously enumerated the ordinary Release, the Surrender, Lease and Assignment, and Fine and Recovery remained unaffected by the Statute of Uses; and Covenants to stand Seised and Defeasances fell into general disuse.

Changes after the period of the Statute of Uses.

It remains to notice the further changes which have taken place, since the passing of the Statute of Uses, down to the present time.

Wills.

The first of these, in point of date, had reference to Wills. Before the date of the Statute of Uses, personal property was freely transmissible, but the only mode by which real property could be disposed of by will was a devise of the use in it. When the statute turned uses into legal estates, even this mode of devise was no longer practicable; and so, for a short time, there existed no means by which real property could be disposed of by will.

Statute of Wills of Henry the Eighth.

12 Car. II. c. 24.

But some five years after the passing of the Statute of Uses, there came the first Statute of Wills, the 32 Hen. VIII., c. 1, which gave power to every person to devise, by his last will or testament in writing, all lands and hereditaments which he held in socage, and two-thirds of those which he held by knight service. This was followed up by the 12 Car. II., c. 24, which turned the tenure of all lands held by knight service into that of socage, and thus the fee-simple of all hereditaments of freehold tenure became devisable. A will could moreover, since the Statute of Uses, operate as a settlement, as well as for the immediate passing of property. For it might contain, under the name of executory devises, springing or shifting uses, and powers, whereby future estates arise or can be created. This Statute of Wills did not, however, apply to any heredita-

ments other than those belonging to the testator at the time of making his will; neither did it include copyholds (*t*). A will could, therefore, be only made to operate on copyholds, by first surrendering them to the use of the testator's will during his lifetime, and then devising the use.

Statute of Frauds.

The next statute which referred to wills was the Statute of Frauds (*u*), which, in addition to the writing required for a will of lands by the Statute of Wills of Henry the Eighth, prescribed its execution by the testator in the presence of three or more credible witnesses; who were also to append their signatures, by way of attestation. This statute also, practically, made it necessary for all wills of personal property to be in writing and signed by the testator. Next, after a long interval, came the 55 Geo. III., c. 192, which enacted that where, by the custom of a manor, a copyhold tenant might devise tenements previously surrendered to the use of his will, he might, thenceforth, devise them without any previous surrender. But this Act did not enable a devisee (*v*), or a purchaser, of copyholds (*w*), to devise them unless he had himself been previously admitted a tenant of the manor. Now, however, it is enacted by the present Wills Act, the 7 Wm. IV. and 1 Vict., c. 26 (*x*), that every person may devise all real and personal estate to which he is entitled, either at law or in equity ; and this power is to extend to copyholds, notwithstanding that the testator, whether entitled as heir, devisee, or otherwise, has not been admitted thereto. The Act also requires (*y*) that every will, whether of real or personal estate (with certain exceptions, such as the will of personal estate of a soldier in actual military service), shall be signed by the testator in the presence of, and be attested by, two witnesses. The Wills (Soldiers and Sailors) Act, 1918 (*z*), enables soldiers and

55 Geo. III. c. 192.

Wills Act.

(*t*) *Wainewright* v. *Elwell*, 1 Madd. 627.
(*u*) 29 Car. II. c. 3.
(*v*) *Doe* v. *Lawes*, 7 A. & E. 195.
(*w*) *Matthew* v. *Osborne*, 13 C. B. 919.
(*x*) S. 3.
(*y*) S. 9.
(*z*) 7 & 8 Geo. V. c. 58 (see later Chap. VII.).

sailors to make informal wills of real estate under certain circumstances.

Trusts.

The Statute of Frauds made other desirable changes besides those relating to wills. Uses had been upheld by the Court of Chancery even where there was no written evidence of their existence, and the same rule prevailed, at first, in regard to trusts. But the statute enacts (*a*) that all declarations of trust of land, except (*b*) in the case of a resulting trust, shall be manifested and proved by some writing, signed by the party enabled by the law to declare such trust. Upon these sections it has been held, that writing is necessary only as a proof of the existence of a trust, and not for its creation (*c*), and that the person "enabled by the law" to declare the trust is the settlor, and not the trustee (*d*).

Statute of Frauds.

Feoffments and leases.

Statute of Frauds.

The Statute of Frauds also made writing necessary in other cases where, as we have seen, it was not formerly required. For it enacted (*e*) that all leases, estates, interests of freehold or terms of years, or any uncertain interests of and in any hereditaments, created by livery of seisin only, or by parol, and not put in writing, and signed by the parties making or creating the same, or their agents thereunto lawfully authorised, should have the force and effect of leases or estates at will only. An exception was however (*f*) made in favour of leases not exceeding a term of three years, whereupon the rent reserved during the term amounts to two-thirds of the full and improved value of the thing demised. The statute also provided (*g*) that no leases, estates or interests of freehold, or terms of years, or any uncertain interests, not being copyhold or customary interests in, to, or out of any hereditaments, should be assigned, granted, or surrendered, unless it be by deed or

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(*a*) S. 7.
(*b*) S. 8.
(*c*) *Gardner* v. *Rowe*, 2 S. & S. 346, 5 Russ. 258.
(*d*) *Tierney* v. *Wood*, 19 Beav. 330.
(*e*) S. 1 (*f*) S. 2. (*g*) S. 3.

note in writing, signed by the party assigning, granting, or surrendering the same, or by his agent thereunto lawfully authorised, or by act and operation of law.

Real Property Amendment Act.

These provisions of the Statute of Frauds were supplemented by the Real Property Amendment Act, the 8 & 9 Vict., c. 106, which (*h*) makes void all feoffments, partitions, leases, assignments, and surrenders unless made by deed, except feoffments made under a custom by an infant, partitions and exchanges of copyholds, and leases not required by law to be in writing—that is, those excepted by the Statute of Frauds.

Attornment. 4 & 5 Anne, c. 3.

The next change effected in the transfer of land was by the 4 & 5 Anne, c. 3. This Act (*i*) makes good all grants of any manors or rents, or of the reversion or remainder of any messuages or lands, without any attornment of the tenants of the manors or lands out of which such rent issues; or of the particular tenants upon whose particular estate any such reversions or remainders shall be expectant or depending.

Fines and Recoveries Abolition Act.

The next Act to be mentioned is that for the Abolition of Fines and Recoveries (*j*), which substituted a deed, inrolled within six calendar months after execution, for the ancient process of a fictitious suit.

Lease and Release made unnecessary. 4 & 5 Vict. c. 21.

Next we find the 4 & 5 Vict., c. 21, which did away with the necessity for two deeds in a conveyance by Lease and Release; for it enacted that every deed of release of freehold estates, expressed to be made in pursuance of the Act, should, thenceforth, be as effectual as if the releasor had also executed a deed or instrument of bargain and sale, or lease for a year, for giving effect to such release.

Real Property Amendment Act.

Next to be noticed is the Real Property Amendment Act (*k*), already referred to, which, in addition to its other

(*h*) S. 3.
(*i*) S. 9.
(*j*) 3 & 4 Wm. IV. c. 74.
(*k*) 8 & 9 Vict. c. 106.

provisions, effected an important change in the mode of conveying freeholds. For it rendered unnecessary any conveyance of land by way of lease and release, by declaring (*l*) that from thenceforth all corporeal hereditaments should, as regards the immediate freehold thereof, lie in grant as well as in livery, thus enabling all hereditaments, whether corporeal or incorporeal, to be conveyed by a simple deed of grant. The Act also (*m*) put an end to the tortious operation of feoffments, and thus caused a feoffment in fee-simple by any tenant with a limited interest to operate as a conveyance of such interest only (*n*). Next we have to mention the Inclosure Acts (*o*), enabling changes to be made through the instrumentality of the Board of Agriculture (whose order permitting an exchange or partition is good without any further conveyance or release).

Tortious feoffments put an end to.

Inclosure Acts.

Lastly by the Land Transfer Acts 1875 (*p*), and 1897 (*q*), the owner of land may be registered as the proprietor of that land and the land can then be transferred by a registered transfer or mortgaged by a registered charge. Registration of title is compulsory in the County and City of London.

Land Transfer Acts, 1875 and 1897.

We may also mention the Vendor and Purchaser Act, 1874 (*r*), the Conveyancing Acts 1881 to 1911 (*s*), and the Settled Land Acts, 1882-90 (*t*). These, however, have not created any new modes of assurance, although they have brought about important changes in their forms. And since these changes will be considered in detail in the subsequent chapters, it will not be necessary to discuss them now.

(*l*) S. 2.
(*m*) S. 4.
(*n*) Shelf. R. P. Statutes, 637, note (k).
(*o*) 8 & 9 Vict. c. 118; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43; 31 & 32 Vict. c. 89; 39 & 40 Vict. c. 56; 45 & 46 Vict. c. 38; 52 & 53 Vict. c. 30; 3 Edw. VII. c. 31.
(*p*) 38 & 39 Vict. c. 87.
(*q*) 60 & 61 Vict. c. 65.
(*r*) 37 & 38 Vict. c. 78.
(*s*) 44 & 45 Vict. c. 41; 45 & 46 Vict. c. 39; 55 & 56 Vict. c. 13; 1 & 2 Geo. 5 c. 37.
(*t*) 45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69.

We have thus traced the history of conveyancing down to the date of the Statute of Uses; examined the great changes made by the statute, not only in the nature of legal estates, but in the modes also in which they could be settled and conveyed; and observed the origin and growth of the power of disposition by will; the safeguards against fraud provided by the Statute of Frauds and the Real Property Amendment Act; the abolition of the ceremony of attornment, and of the cumbrous process of fines and recoveries; the enactments by which the lease and release gave way, first to the release alone, and then to the simple grant; the simplicity introduced by the Inclosure Acts into the exchange and partition of land, and finally the mode of registered transfer introduced by the Act of 1875. The result, from a conveyancing point of view, is that we have now the Grant and Assignment (comprehended under the general name of Purchase Deeds), and Registered Transfer, for the sale of land; the Mortgage Deed, or Registered Charge, for its pledge; the Lease to give its temporary possession; the Settlement whereby estates can, subject to due precautions, be preserved in families; and the Will, which can either operate as a settlement, or effect a direct transmission of property from one person to another.

In the succeeding chapters the assurances enumerated above will be considered; and we may take this opportunity of stating that our remarks will, as a rule, extend only to the simplest forms of those instruments which convey the legal estates in the various kinds of property which have been referred to in this Chapter.

CHAPTER II.

OF CONTRACTS FOR THE SALE OF LAND.

HAVING thus traced the history of conveyancing down to our own times, we have next to consider, in detail, the various instruments at present used for the transfer of real property. Now, each of these instruments marks the carrying out of some pre-existing purpose, which may have been that of one person, or of several. In the latter case, it will usually be found that the terms of the assurance have been the subject of previous negotiations, which have resulted in an agreement, or contract, and this contract forms an important part of the transaction, being the foundation of the edifice of which the assurance is the completion. This remark applies particularly to the ordinary case of vendors and purchasers of land. Hence, it is proposed, before considering purchase deeds of real and leasehold estates, to turn our attention to the contracts by which they are preceded.

Such a contract is, like all contracts, subject to various rules of law, non-compliance with which will render it invalid. There are also certain statutory requirements which are essential to the proof of its existence, though not to its creation. Under the former, a contract may be set aside on account of the incapacity of one, or more, of the parties to it; on account of there having been some fraud, or mistake, committed with reference to it; and on several other grounds which need not be further particularised. With these we shall not occupy ourselves to any great extent, for our aim is chiefly to ascertain how a contract of sale of land ought to be drawn up, supposing it to have been properly entered into. This, however, involves the consideration of the statutory requisites for such a contract, and of the judicial decisions

upon the wording of Acts of Parliament relating to these requisites.

And it may be as well here to remind the reader of the important change made in our system of jurisprudence by the Judicature Acts, 1873 and 1875 (*a*). The Act of 1873 enacts (*b*), that except in matters therein particularly mentioned (none of which relate to our subject), whenever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail. Consequently, although reference will occasionally be made in this and the following chapters to rules of law which differed from those of equity, it will only be in order to mark out equitable doctrines with more distinctness.

Division of the subject.

Since, then, the preparation of a contract of sale of land is governed by the enactments and decisions to which reference has been made above, we will, in this chapter, discuss separately the statutory requisites for such a contract; and the proper form of the contract when embodied in an Agreement, or in Conditions of Sale.

We shall then consider the effect of the contract pending completion of the sale; the Abstract of Title, its verification and proof; the Requisitions on the abstract and the answers to such requisitions; the completion of the contract; the searches usually made by the purchaser; how the costs of the sale are borne; the capacity of the parties and their power to convey; and, finally, the remedies for breach of the contract.

Summary of the steps on a sale of land.

Before considering these points in detail, it may be useful to set out a summary of the steps that usually occur on a sale of land, namely, 1st, The contract of sale; 2nd, The vendor (or his legal adviser) prepares an Abstract of Title, containing an analysis of his title to the land; 3rd, The

(*a*) 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77.
(*b*) S. 25, sub-s. 11.

purchaser (or his legal adviser) compares the abstract with the actual title deeds at the office of the vendor's solicitor; 4th, The purchaser (or his legal adviser) then puts such requisitions, or enquiries on and demands as to the title, which may appear to be necessary and permissible; 5th, These requisitions are sent to the vendor or his legal adviser, who returns written answers thereto; 6th, The purchaser (or his legal adviser) then draws up a conveyance, and this is executed by the vendor.

I. The Statutory Requisites and Form of a Contract for the Sale of Land.

Statutory requisites for the contract.

Statute of Frauds.

The principal statutory requisites for the contract are to be found in the fourth section of the Statute of Frauds (*c*). This section enacts that, from thenceforth, no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Statute applies to every interest in land.

What is required by the statute.

The first point to be noticed is, that these provisions of the statute apply to every agreement which is substantially one for the sale of an interest in land (*d*). We have next to consider what things are required by the statute. These are, (1) a written agreement or written memorandum of the agreement, and (2) signature by the party to be charged or his agent lawfully authorised.

Written agreement or memorandum.

What must be contained in the agreement or memorandum.

The written agreement, or written memorandum of the agreement must show (1) the names or description of the contracting parties as such, (2) the consideration, and (3) the subject-matter or object of the contract (*e*). The names of

(*c*) 29 Car. II. c. 3.
(*d*) *Jarris* v. *Jarris*, 63 L. J. Ch. 10; *Lavery* v. *Pursell*, 39 Ch. D. 508.
(*e*) *Per* C.J. Tindal, 2 Bing. N. C. 742.

the vendor and purchaser need not appear if there is a sufficient description of them. It has, therefore, been held (*f*) that a contract signed by an agent "as agent for the vendors," but not naming them, was a sufficient description of the latter as contracting parties, when indorsed on a paper stating the vendors to be "the executors of Admiral F., deceased" (*g*). It would not be sufficient to describe the vendor merely as "vendor" of the land sold (*h*). The same rule applies to the description of the property sold. Parol evidence is admitted in either case to explain the description (*i*).

Agreement need not be in one document.

The written agreement need not, necessarily, be contained in one document; it may be made out from several documents if they can be connected together. If one of two documents is on the face of it incomplete it may be connected with the other by parol evidence (*j*). Thus parol evidence was admitted to connect a letter addressed "Dear Sir" with the envelope on which the purchaser's name was written (*k*). But to constitute a memorandum of a verbal agreement within the Statute of Frauds the written documents must be capable of being connected together of themselves without the assistance of parol evidence (*l*).

Parol evidence when admissible.

When terms of agreement are clear.

If the terms of the written agreement are clear and complete, without reference to anything else, then it is a general rule of the law of evidence, irrespective of the Statute of Frauds, that no parol evidence is admissible to contradict or vary the written agreement (*m*), and the same rule, it has been said, prevails in equity, so far as regards the tendering of parol evidence by a plaintiff except when the parol varia-

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(*f*) *Hood* v. *Barrington*, L. R. 6 Eq. 218.
(*g*) And see *Catling* v. *King*, 5 Ch. D. 660.
(*h*) *Potter* v. *Duffield*, L. R. 18 Eq. 4; *Lavery* v. *Pursell*, 39 Ch. D. 508.
(*i*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Auerbach* v. *Nelson*, [1919] 1 Ch. 383; 88 L. J. Ch. 493; 63 S. J. 683.
(*j*) *Oliver* v. *Hunting*, 44 Ch. D. 205.
(*k*) *Pearce* v. *Gardner* [1897] 1 Q. B. 688.
(*l*) *Chaproniere* v. *Lambert* [1917] 2 Ch. 356.
(*m*) *Goss* v. *Nugent*, 5 B. & Ad. 58, 64.

tion set up is in favour of the defendant (*n*). But an exception is made in the case of a defendant against whom specific performance of a contract is sought. For he may adduce parol evidence to show that the written agreement does not represent the real intention of the parties to it (*o*). Some authorities, however, consider that since the Judicature Act, 1873, s. 24 (7) there is no difference in the position of the vendor and the purchaser and that both can enforce specific performance with parol variations (*p*).

When agreement is ambiguous.

If the instrument contains a patent ambiguity, one, that is, apparent upon the face of the instrument itself, the latter is entirely void. But if there be a latent ambiguity, that is, one of such a nature that its existence is first shown by extrinsic evidence, whether written or verbal, it may be explained by extrinsic evidence which may be either written or verbal. If a man, for instance, agrees in writing to sell "his manor of A.:" this appears, on the fact of the document, to be straightforward enough. But if it can be shown that the vendor has two manors, one called North A., and the other South A.; then, since the agreement does not specify which of them he has contracted to sell, parol evidence is admissible to explain this latent ambiguity raised by extrinsic evidence (*q*).

Enforcement of oral contract.

An oral agreement for the sale of land may sometimes be enforced although there is no memorandum in writing to satisfy the Statute of Frauds; namely (1) Where there has been a verbal contract, followed by a partial performance of it by one party, unequivocally referable to the agreement alleged, the other party to the contract will, in general, be compelled to perform his part, notwithstanding the absence of any written agreement. For in all questions on the Statute of Frauds, the end and purport of making it has been considered, namely, to prevent frauds and perjuries; so that

(*n*) See Wms. V. & P. 789—90; *North* v. *Loomes* [1919] 1 Ch. 378.
(*o*) *Woollam* v. *Hearn*, 7 Ves. 211b, and, with notes, 2 L. C. 468; *May* v. *Platt* [1900] 1 Ch. 616.
(*p*) Wms. V. & P. 791.
(*q*) See *Jones* v. *Newman*, 1 W. Bl. 60.

any agreement in which there is no chance of either, the Court has considered as out of the statute (*r*). (2) On this ground also, it seems that the statute never extended to sales under the order of the Court of Chancery. (3) When the Statute of Frauds is not specially pleaded in the defendant's defence to the contract. (4) When it would be a fraud for the defendant to rely on the Statute, *e.g.*, when by his fraud he prevented the oral agreement being put into writing (*s*).

Signature.

Next, as to the signature. It is clearly settled that the signature of the party to be charged is sufficient to bind him at law, and to induce a court of equity to decree specific performance of his contract by him, although there may not have been any signing by the other party to the contract (*t*).

What is a sufficient signature.

And it seems that putting a man's initials to a document (*u*), or his printed signature, if ordinarily used (*v*), satisfies the requirements of the statute. Nor does it matter in what part of the agreement the signature is to be found; unless the document is evidently incomplete (*w*).

A corporation aggregate which has a common seal must use that seal as its ordinary signature. It could not, therefore, at common law, either enforce (*x*) or be bound by ordinary contracts not under its seal (*y*); but according to the rules of equity it is bound by contracts within its province, although not under seal, where there has been part performance by the other contracting party (*z*), except in cases where the application of its seal has been expressly required by statute (*a*). And with regard to such corporations aggre-

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(*r*) *Per* Hardwicke, C. *Atty.-Genl.* v. *Day*, 1 Ves. Senr. 218, 220. See also *Lester* v. *Foxcroft*, 1 Colles. P. C. 108, and, with notes, 1 L. C. 828; and note to *Pym* v. *Blackburn*, 3 Ves. p. 38.

(*s*) Wms. V. & P. 11—14.

(*t*) See *Williams* v. *Lake*, 29 L. J. Q. B. 1, 3; *Western* v. *Russell*, 3 Ves. & B. 187, 192. Fry on Specific Performance, 205.

(*u*) *Phillimore* v. *Barry*, 1 Camp. 513.

(*v*) *Saunderson* v. *Jackson*, 2 Bos. & P. 238.

(*w*) *Hubert* v. *Treherne*, 3 Man. & Gr. 743.

(*x*) *Mayor of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 13.

(*y*) Grant, Corp. 55. *East London Waterworks Co.* v. *Bailey*, 4 Bing. 283.

(*z*) *Crook* v. *Corporation of Seaford*, L. R. 6 Ch. 551.

(*a*) *Hunt* v. *Wimbledon, Local Board*, 4 C. P. D. 48.

gate as are companies formed under the Companies Acts, 1862—1908 (*b*), it has been enacted (*c*) that any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of a company, in writing signed by any person acting under the express or implied authority of the company.

Signature by agent.

Auctioneer.

The Statute of Frauds also makes a signature by a lawfully authorised agent binding on his principal. On this point it may be mentioned that the auctioneer at a sale is the agent of both parties for the purpose of signing a memorandum of the contract (*d*), and that his signature is binding upon either the vendor or the purchaser if his authority is not revoked; and it has been held that after the fall of the hammer neither party can revoke the auctioneer's authority to sign for him. But the authority impliedly given by the purchaser to the auctioneer is an authority to sign immediately after the sale, and if this be not done the authority will cease (*e*).

Auctioneer's clerk.

The signature of his clerk is also sufficient to bind a party who has authorised the clerk to sign for him (*f*). But in the absence of such authority the clerk's signature has no binding effect (*g*). If after a sale by auction the vendor or the purchaser refuse to sign a memorandum and the auctioneer will not sign for him, the other party has apparently no remedy to enforce his bargain (*h*).

Section 4 of the Statute of Frauds deals only with the enforceability of the contract. The question as to the existence and validity of the contract depends upon the ordinary rules of contract law, *i.e.*, there must be offer and acceptance, capacity of the parties, consideration, no mistake, fraud, or illegality. Sales of land may take place by

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(*b*) 25 & 26 Vict. c. 89; 8 Edw. 7 c. 69.
(*c*) 30 & 31 Vict. c. 131 s. 37; 8 Edw. 7 c. 69 s. 76.
(*d*) *Kemeys* v. *Proctor*, 3 Ves. & B. 57.
(*e*) Wms. V. & P. 21; *Bell* v. *Balls* [1897] 1 Ch. 663.
(*f*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Bird* v. *Boulter*, 1 Nev. & M. 313.
(*g*) *Pierce* v. *Corf*, L. R. 9 Q. B. 210; *Bell* v. *Balls* [1897] 1 Ch. 663.
(*h*) Wms. V. & P. 22.

private agreement or at an auction. In either case there is an offer and an acceptance. When land is sold at an auction, the contract is complete directly the hammer falls. This is the acceptance by the vendor's agent, the auctioneer, of the offer of the intending purchaser. Sometimes the printed "conditions of sale," distributed among those who attend at an auction, contain a provision that no offer once made by a bidder can be withdrawn. Probably this provision is not binding in law and the bidder can withdraw his offer at any moment before the hammer falls. When land is sold by private agreement there is usually a letter making an offer to buy or sell followed by a letter accepting that offer. If a numbers of letters have passed between the parties, the whole correspondence must be looked at (*i*). If a person in accepting an offer introduces a new term in the agreement, this must be agreed to by the other party before any binding contract can arise. But a completed offer and acceptance by correspondence cannot be affected by subsequent negotiation not resulting in a new contract to take the place of the former one (*j*). If the offer is accepted "subject to the preparation and approval of a formal contract," there is no contract until such formal contract has been prepared and approved as it is clearly made a condition precedent of the acceptance (*k*). If it is said merely "a formal agreement will be prepared," it is a question of construction whether a binding contract has been entered into or not (*l*). If a letter, containing an unqualified acceptance, is posted, the contract is completed directly the letter of acceptance is posted if (1) the offer was made by post or (2) the circumstances show that the parties contemplated that the post should be used as a mode of communicating the acceptance.

The written contract.

We have now arrived at the consideration of the manner in which a contract for the sale of land should be prepared. If the sale is to be by private contract, the particulars of the

(*i*) *Hussey* v. *Horne Payne*, 4 App. Cas. 311.
(*j*) *Perry* v. *Suffields, Ltd.* [1916] 2 Ch. 187.
(*k*) *Winn* v. *Bull*, 7 Ch. D. 29.
(*l*) *Rossiter* v. *Miller*, 3 App. Cas. 1124; *Rouse* v. *Guisborg*, 55 S. J. 632.

property to be sold and the terms mutually assented to by the parties are, in general, contained in numbered clauses of the same document, which is known as the Agreement. If it is to be by public auction, the particulars of the property are kept apart from those clauses in which the vendor states the terms on which he is prepared to sell, and which are consequently known as the Conditions of Sale.

Open contract.

If the contract for the sale of land shows the parties, the property to be sold and the price to be paid, but leaves the other terms to be implied by law, it is said to be an open contract (*m*). In such a case the following implied conditions would apply (*n*)

(1) The vendor shall show a good title to the property sold.

(2) He must deliver at his own expense and verify an abstract of title showing the dealings with the property for a certain period before the date of the contract of sale. These periods are as follows:

(i.) On sale of freehold, forty years' title beginning with a "good root of title" *i.e.*, some instrument of disposition of the property dealing with or proving on the face of it, without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified, and showing nothing to cast any doubt on the title (*o*).

(ii.) On sale of freeholds, formerly copyhold but enfranchised within forty years of the sale, the freehold title back to and including the enfranchisement, and beyond that the copyhold title back to forty years before the contract, but not the title to make the enfranchisement (*p*).

(iii.) On sale of leaseholds, production of the lease under which the property is held in all cases, however long

(*m*) Wms. V. & P. 17.
(*n*) Wms. V & P. 41—51, 100—1.
(*o*) Wms. V. & P. 42; Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78, s. 1).
(*p*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 3 (2)).

ago the lease was granted; and, if the lease be more than forty years old, the title under the lease for the forty years next before the contract, otherwise the whole title subsequent to the lease, but not in any case the title to the freehold (*q*) nor, in the case of the sale of property held by underlease, the title to any leasehold reversion (*r*). The same rule applies on a contract to grant a lease, the intended lessee, in the absence of stipulation to the contrary, not being entitled to call for the title to the freehold (Vendor and Purchaser Act, 1874), nor for the title to any leasehold reversion to the intending lessor's interest (Conveyancing Act, 1881) (*s*). But on a contract to grant an underlease, the intending lessor must produce the lease under which he holds, and show the subsequent title thereunder, if it be less than forty years old, otherwise the last forty years' title thereunder. Thus A., a tenant in fee-simple of freehold land, agrees under an open contract to lease the land to B. for ninety-nine years. B. cannot call for A.'s title. If the present holder of such lease agrees by open contract to sell his lease to C., C. can demand the production of the lease to B., and the assignments thereof during the last forty years, if the lease to B. was granted more than forty years ago; if granted less than forty years ago, the original lease and the dealings with it since it was granted. If C. agrees, by open contract, to grant an underlease to D., D. can call for the production of the lease granted to B. and the assignments thereof during the last forty years if the lease was granted more than forty years ago; if granted less than forty years ago, the production of the lease granted to B. and the dealings with it since it was granted. If D. agrees, by open contract, to sell his underlease to E., E. can call for the production of the underlease by C. to D., but can-

(*q*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78, s. 2, r. 1).
(*r*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 3 (1)).
(*s*) 44 & 45 Vict. c. 41, s. 13.

not demand the production of the lease from A. to B. nor the assignment of it to C.

(iv.) On sale of an advowson, the title for at least one hundred years before the date of the contract, together with a list of the presentations made during that period.

(v.) On sale of tithes or other property held under a grant from the Crown, the production of the original grant in all cases, and the title thereunder for the forty years next before the contract.

(vi.) On sale of a reversionary interest, the production of the deed or other instrument which created it and proof that possession of the land has been in accordance with such instrument. If the reversionary interest were created less than forty years before the contract, the title subsequent to its creation must be produced.

(3) He must prove the identity of the property sold with that described in the title deeds.

(4) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and description (*t*).

(5) The purchaser shall not require the production of any deed, will, or other document dated before the time prescribed by law or stipulated in the contract for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the

(*t*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78, s. 2, r. 2).

contrary appears, that the recitals contained in the abstracted instruments of any deed, will, or other document, forming part of that prior title are correct and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise (*u*).

(6) If the property is misdescribed and the misdescription is substantial, the vendor cannot enforce the contract and the purchaser may treat the contract as broken; but if there is a deficiency capable of assessment in money, the purchaser can obtain specific performance of the contract with compensation for the deficiency, unless this might prejudice third parties, or involve great hardship on the vendor. If, owing to an innocent error of the vendor, there is a misdescription, but the misdescription is slight, then the vendor can claim specific performance, giving compensation to the purchaser, and the purchaser can enforce specific performance, claiming compensation from the vendor. If the vendor, by his own fault or inadvertence, has described in the contract a property larger than he intended to sell, and he can convey such property, the vendor cannot claim compensation if he seeks to enforce the contract either at law or in equity; but if the purchaser claim his equitable remedy of specific performance, he must take without compensation what the vendor really intended to sell, if the vendor made the mistake innocently and the error is so serious that it would be a great hardship on the vendor to compel him to carry out the contract specifically (*v*).

(7) The vendor must produce evidence of title in his own possession. The purchaser shall pay the cost of procuring and producing all evidence of title, such as documents of title, which he may require but which are not in the vendor's possession (Conveyancing Act, 1881) (*w*).

(8) The vendor shall pay the cost of stamping all documents of title which are insufficiently stamped.

(*u*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 3 (3).
(*v*) Wms. V. & P. 44—5. (*w*) 44 & 45 Vict. c. 41, s. 3 (6).

(9) The purchase shall be completed as soon as the vendor shall have shown a good title, and the purchaser shall then prepare a conveyance at his own expense, and take the same to the vendor for execution, at the same time tendering the purchase money; and the vendor shall then execute the conveyance at his own expense and give possession of the property to the purchaser. The conveyance must be effectual to vest the whole estate contracted for, legal and equitable, in the purchaser and contain or imply covenants for title. If, in order to make a good title, it is necessary for the vendor to procure the joinder of other parties to the conveyance, the vendor shall at his own expense procure the joinder of such parties (*x*). If the vendor has agreed to convey the legal estate, and the legal estate is outstanding, the vendor must bear the expense of getting it in.

(10) The vendor on completion shall hand over to the purchaser all the documents of title relating solely to the property purchased, but he can retain any documents of title in his own possession which relate to any part of an estate retained by him; and he shall not be required to abtain and hand over to the purchaser any documents of title, which relate to other property as well as to the property sold, and of which any person other than the vendor is entitled to retain possession (Vendor and Purchaser Act, 1874) (*y*). If the vendor retain any document of title he must give to the purchaser a proper statutory acknowledgment of the purchaser's right to production and delivery of copies and a proper statutory undertaking for safe custody (Conveyancing Act, 1881) (*z*).

(11) Any act necessary to be done by either party to carry out the contract, such as the delivery of the abstract, statement of objections to or the acceptance of the title, or the preparation of the conveyance, shall be done within a reasonable time (*a*). In case of unreasonable delay by either party to do any act necessary to carry out the contract, the other party may serve a notice on the party in default requiring him

(*x*) Wms. V. & P. 46—7.
(*y*) 37 & 38 Vict. c. 78, s. 2, r. 5.
(*z*) 44 & 45 Vict. c. 41, s. 3 (6). See, later, Chapter III.
(*a*) Wms. V. & P. 48; *Compton* v. *Bayley* [1892] 1 Ch. 313.

to do such act within a reasonable time, specified in the notice, and stating an intention to terminate the contract if the notice be not complied with. If such notice be not complied with, the party in default shall not be able to obtain specific performance of the contract and may be sued for breach of the contract (*b*).

(12) From the date of the contract of sale the property shall in equity belong to the purchaser, but the vendor, until the time for completion, shall take the rents, crops and other ordinary profits for his own use. Rents accrued due at but not payable until after the time for completion shall be apportioned between vendor and purchaser (*c*).

(13) The vendor, until completion, shall retain possession of the property, and shall look after it as if he were a trustee of the property for the purchaser, and shall pay all rates, taxes and outgoings up to the time of completion. The purchaser bears losses and takes the advantage of all additions or improvements.

(14) If the purchase shall not be completed at the proper time, the purchaser shall pay interest at four per cent. on the purchase money until completion, but shall be entitled as from that time to rents and other ordinary profits of the property, the vendor accounting to the purchaser for such rents and profits when the purchase shall be actually completed. The vendor in occupation shall pay occupation rent from the proper time for completion until actual completion. If the delay in completion be due to the vendor and the purchaser appropriates his money to the purchase by depositing it in a bank and giving notice to the vendor, the purchaser shall, from the time of such appropriation, pay no more interest on the purchase money except such interest as he shall receive in respect of such deposit (*d*).

The question now arises whether it is an advantage for a purchaser to buy freeholds or leaseholds by open contract.

(*b*) Wms. V. & P. 49.
(*c*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2.
(*d*) Wms. V. & P. 51.

It is clearly an advantage for him to buy freeholds on open contract, for he thereby becomes entitled to proof of the title for the last forty years and the title must begin with a "good root of title." On the other hand if he agrees, by an express condition of sale, to accept a title of less than forty years, he will be held to have constructive notice of all equitable interests apparent on the face of the title for the last forty years, even though, by the express condition of sale, he was debarred from inquiring into such matter, *e.g.*, A. in 1882 conveyed his land to B. and the conveyance contained restrictive covenants as to the use of the land. In 1890 B. sold this land to C. C. in 1920 agrees to sell this land to W. and there is a condition of sale that the title to be shown by C. to W. shall begin with the conveyance of 1890. W. is bound by the restrictive covenants in the deed of 1882, on the ground that he has "constructive notice" of them as, if he had refused to accept a shorter title than forty years, he would have discovered such covenants. It is not an advantage to buy leaseholds on open contract, because the purchaser may thereby acquire a very short title, *e.g.*, if a lease was granted by A. to B. in 1910, and in 1920 B. sells the lease to C. by open contract, C. can only claim production of the lease of 1910 and the title since then. Moreover the purchaser is held to have constructive notice of restrictive covenants affecting the freehold and is therefore bound by them, even though, by the Vendor and Purchaser Act of 1874, he cannot, on the purchase of a lease by open contract, demand production of the title to the freehold (*e*).

The principle appears to be that a purchaser who, on the sale of freeholds, agrees to accept a title of less than forty years, and a purchaser who, on the sale of leaseholds, does not expressly stipulate for the title to the reversion to be proved, have constructive notice of the restrictive covenants of which, if they had taken greater precautions, they would have had actual notice.

(*e*) *Patman* v. *Harland*, 17 Ch. D. 353.

A vendor of freeholds does not usually desire to sign an open contract because he wishes to obtain a deposit as a guarantee for the due performance of the contract, he probably does not want to prove forty years title, he wishes to be able to rescind if onerous requisitions are made, and he wants stipulations to be inserted as to the time within which requisitions on title are to be made. In settling a private contract, therefore, the object of the legal adviser acting for the vendor will usually be to obtain the insertion of the stipulations made on sales by auction (*f*).

Sales by auction.

With such sales by auction we now proceed to deal and it is proposed first to offer a very few remarks on the preparation of the particulars, and then to go through the clauses of an ordinary precedent of conditions of sale of freeholds, or copyholds, in lots; calling attention to the leading principles on which they are prepared, and adverting when necessary to such modifications as would be needed in order to adapt them to a sale by private contract, or to the sale of leaseholds. The object of the particulars is to describe the property it is proposed to sell; the object of the conditions is to state the terms on which it is to be sold.

The particulars.

In the preparation of the particulars, two points must be specially attended to. The first is, that they must comply with the rules before mentioned as founded on the Statute of Frauds, by stating, distinctly or by necessary implication, that which is the subject-matter of the contract. The second is, that they must not be so worded as to mislead a purchaser by any statement as to a matter of fact which describes the property inaccurately with regard to its advantages or value. Thus, in one case (*ff*), a large farm, on an estate to be sold, was described as "late in the occupation of A. at the rent of £290." In fact, A. had occupied the farm for a year at the rent of £290, but for the previous quarter of a year he had only paid a rent of £1; and thus had paid only £291 for a

(*f*) Wms. V. & P. 86—7.
(*ff*) *Dimmock* v. *Hallett*, L. R. 2 Ch. 21.

tenancy of a year and a quarter. At the end of that time he had quitted the farm, and another person who had, subsequently, agreed to give £225 a year for it, had paid £20 to be off his bargain. The statement in the particulars was consequently held to be one calculated to mislead the purchaser of the estate, who was therefore held to be entitled to rescind his contract. A similar decision was arrived at in a case where the particulars of sale of leasehold property omitted to state that it was subject to a ground-rent, there being in fact a substantial ground rent, and the circumstances being such that the purchaser had good reason for believing that the ground rent was only nominal (*g*). And a misstatement as to the nature of the property, such as describing leaseholds, for however long a term, as freeholds, or describing an underlease as a lease, would entitle the purchaser to rescind (*h*). Maps or plans of the property, forming as they do a part of the particulars, are subject to the same rules (*i*).

It must be shown that the misrepresentation was as to some material fact and that the purchaser was misled by it. This would include the concealment of a fact which the vendor should disclose to the purchaser, *e.g.*, if the vendor does not disclose an easement over the property (*j*). In one case (*k*), the purchaser discovered that there was a watercourse, running under the property he had agreed to buy, of which neither he nor the vendors were previously aware; it was held he could rescind the sale, as he had, to the knowledge of the vendors, bought the land for building purposes. There is no obligation to disclose patent defects, *e.g.*, a public footpath over a field (*l*).

Conditions of sale.

Next, as to the preparation of the conditions of sale. This is always a matter which requires care, since these conditions

(*g*) *Jones* v. *Rimmer*, 14 Ch. D. 588.
(*h*) *Re Beyfus and Master's Contract*, 39 Ch. D. 110; *Broom* v. *Phillips* (1896) 74 L. T. 459.
(*i*) *Denny* v. *Hancock*, L. R. 6 Ch. 1; *Re Lindsay and Forder's Contract* (1895) 12 L. T. 832.
(*j*) *Ashburner* v. *Sewell* [1891] 3 Ch. 405.
(*k*) *Re Puckett and Smith's Contract* [1902] 2 Ch. 258.
(*l*) *Bowles* v. *Round*, 5 Ves. 508.

General rules for their preparation.

are inserted in order to restrict the ordinary rights of a purchaser, who has not had any voice in their preparation. It is, therefore, essential that they should be clear and intelligible in stating to a man of ordinary understanding what he is not to require; and that they should not be of such a nature as to mislead or deceive him. Care should also be taken that they are not too stringent.

We will now, as previously arranged, consider *seriatim* those ordinary conditions of sale to which we have referred.

1st condition. Conduct of the sale.

The 1st condition usually relates to the manner of conducting the sale. It fixes a sum as the *minimum* advance which may be made at each bidding, this being regulated generally by the value of the property. It also provides that the highest bidder shall be the purchaser; that if any dispute arises respecting a bidding to any lot, the same shall be put up again and resold; and that no bidding shall be retracted. It is not clear that this last stipulation can be enforced (*m*); but it is clear that, in the absence of it, any bidding may be audibly retracted before the fall of the auctioneer's hammer (*n*). If a vendor issues an advertisement that a sale of land by auction will be held without reserve, or under a condition that the highest bidder shall be the purchaser, and the sale is held, and he then declines to sell to the highest bidder, he is liable on an independent contract that the sale shall be carried out under the conditions advertised, and such contract does not require evidence in writing under the Statute of Frauds (*o*).

Sale subject to a reserve price should be so stated.

Sales of land by Auction Act.

If it is intended that the sale should be subject to a reserve price, this fact should be stated in the conditions. For it is now enacted, by the Sales of Land by Auction Act, 1867 (*p*), passed to put an end to the previously conflicting rules of law and equity on this point (*q*), that the particulars or conditions

(*m*) Wms. V. & P. 20.
(*n*) *Payne* v. *Cave*, 3 T. R. 148.
(*o*) Wms. V. & P. 25; *Johnston* v. *Boyes* [1899] 2 Ch. 73.
(*p*) 30 & 31 Vict. c. 48, s. 5.
(*q*) S. 4, and see *Mortimer* v. *Bell*, L. R. 1 Ch. 10.

of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether the right to bid is reserved; and that, if it is stated that the sale is to be without reserve, it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer knowingly to take any bidding from such person. But (*r*) that when it is declared that the sale is subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction, in such manner as he may think proper. It will be noticed that a right to bid is only given when the sale is declared to be subject to such a right. Hence, it has been held (*rr*) that where the conditions merely state that the sale is subject to a reserved bidding, it is illegal to employ an agent to bid on behalf of the vendor, even in order to bring the biddings up to the reserve price.

2nd condition. Deposit.

The 2nd condition provides for the payment, by each purchaser, of a deposit; which is usually fixed at from £10 to £20 per cent. of the purchase-money. This condition is often dispensed with in sales by private contract, where the purchaser is already known to the vendor. The payment of a deposit is a part payment of the purchase money (*s*), and will, of course, be allowed for on completing the purchase, but the object of the condition is chiefly (as we shall see hereafter) to provide for the imposition of a penalty on the purchaser if he fail to complete the purchase, and to give the vendor a security in respect of any damage which he may sustain by such failure. On sale by auction, the deposit is usually paid to the auctioneer, who holds it as a stakeholder for both parties and, until the contract is completed, must not pay it over to the vendor without the consent of the purchaser. If the contract is completed, or the purchaser breaks the contract, the auctioneer is liable to pay the deposit to the vendor; but if the contract be broken by the vendor, the auctioneer must repay the deposit to the

(*r*) S. 6.
(*rr*) *Gilliatt* v. *Gilliatt*, L. R. 9 Eq. 60.
(*s*) 1 Dav. Con. 520.

purchaser. The auctioneer is entitled to retain for his own benefit any interest he may receive by the use of the money while it is in his hands. On sale by private contract, and sometimes on sale by auction, the deposit is paid to the vendor's solicitor, who, in absence of special agreement, holds it as agent for the vendor. The solicitor is not entitled to retain any interest received by the use of the deposit money, and is bound to hand over the deposit to the vendor at request, and the purchaser has no claim against the solicitor for so handing it over. If, therefore, the deposit is to be paid to the vendor's solicitor, the purchaser should endeavour to procure a provision that the solicitor shall hold it as a stakeholder for both parties (*t*). It is also stipulated by this condition that the purchaser shall sign a memorandum annexed to the conditions, acknowledging that he has purchased the property at the price named, and subject to the conditions. A written memorandum is necessary because sales by auction are within the Statute of Frauds (*u*), but it will be remembered that the auctioneer is the agent of the purchaser, and he can therefore bind the latter by, himself, signing the memorandum of sale, should the purchaser improperly refuse to do so.

3rd condition. Valuation of fixtures and timber.

The 3rd condition provides for the fixtures, timber, and other trees, and underwood, being taken by the purchaser at a valuation, to be made by two valuers, or their umpire, appointed in the usual way. And in order to prevent any question arising from its being impracticable to carry out this stipulation, it is generally added that, if the valuation is not so made, the fixtures, &c., shall be paid for by the purchaser at their fair value, or that one party's valuer, in case of default of the other party or his valuer, shall make a valuation (*v*).

4th condition. Title to be shown.

The 4th condition has for its object the restriction of the purchaser's ordinary rights in respect of the vendor's title to the property. It provides that the title shall commence

(*t*) Wms. V. & P. 27: *Ellis* v. *Goulton* [1893] 1 Q. B. 350.
(*u*) *Buckmaster* v. *Harrop*, 7 Ves. 340.
(*v*) *Bos* v. *Helsham*, L. R. 2 Ex. 72.

with an indenture dated the —— day of —— and made between —— and —— being a conveyance on sale (or mortgage or settlement if such should be the root of title), or with the will of —— dated the —— day of —— and the purchaser shall assume that at the date of his will the said (testator) was seised in fee simple of the property now sold, or, if the property be copyhold, with a surrender thereof to and admittance of A.B. on a sale in year ——, or if the property be leasehold, with the lease under which the same is held (*w*). It is usual to specify the instrument of disposition with which the title shall commence, especially if it is intended to show a shorter title than the period fixed by law when the sale is on "open contract." If the vendor intends to deliver an abstract commencing with a good root of title (such as a purchase deed or mortgage deed transferring the legal estate), and extending over the whole period for which title can by law be required to be shown when the sale is by open contract, no express condition as to title is necessary; but if it be desired to restrict the purchaser's rights as regards length of title, or root of title, a fair and explicit stipulation to that effect must be made. The condition of sale must not be misleading. (See later under "Abstract of Title.") (*x*).

Sale of leaseholds. Vendor and Purchaser Act, 1874.

In regard to the sale of leaseholds, the Vendor and Purchaser Act, 1874, as we have seen, provided (*xx*) that under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign should not be entitled to call for the title to the freehold. But the Act did not preclude a purchaser from requiring proof of the lessor's title when the latter was himself a lessee of the property, neither did it prevent the purchaser from making inquiries, on his own account, into the title of the freeholder on the sale of an original lease: hence special conditions were still necessary in regard to these points.

(*w*) Dav. Con. Prec. 112.
(*x*) Wms. V. & P. 61: *Re Marsh and Earl Granville*, 24 Ch. D. 11.
(*xx*) 37 & 38 Vict. c. 78, s. 2.

Conveyancing Act, 1881.

The Conveyancing Act, 1881 (*y*), relieved vendors from all these difficulties. For as to any sale made after the 31st December, 1881, and so far as a contrary intention is not expressed in the contract of sale (*z*), it enacts that under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion (*a*); that where land sold is held by lease (not including under-lease) the purchaser shall assume, unless the contrary appears, that the lease was duly granted (*b*); and that where land sold is held by under-lease the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted (*c*). The Act has also rendered unnecessary a condition which it was previously requisite to insert by enacting (*d*), that on production of the receipt for the last payment due before the date of the actual completion of the purchase for rent under the lease or under-lease which is being bought, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase; and also, in the case of an under-lease, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date. As to these covenants and provisions, the law holds that a purchaser of leaseholds, in the absence of any misrepresentation, has notice of the contents of the lease, since he ought to ascertain what they are; and in order to give him an opportunity of so doing, it is usual to state in the conditions of sale that a copy of the lease will be open to the inspection of intending purchasers either at the sale or at some named place previously.

Tenancies and under-leases.

A statement that the property is subject to tenancies or under-leases will not affect a purchaser, with notice of the terms on which the under-tenants hold (*e*): consequently

(*y*) 44 & 45 Vict. c. 41.
(*a*) S. 3, sub-s. 1.
(*c*) S. 3, sub-s. 5.
(*e*) *Caballero* v. *Henty*, L. R. 9 Ch. 447.
(*z*) S. 3, sub-ss. 10, 9.
(*b*) S. 3, sub-s. 4.
(*d*) *Ibid.*

either these should be fully stated or (which is the better plan) it should be said that they can be inspected at the office of the vendor's solicitor before the sale, and that every purchaser is to be deemed to have full notice of their contents. In a case (*f*) decided before the passing of the Vendor and Purchaser Act, 1874, it was held that, in the absence of agreement, the vendor of leasehold property must produce the lease under which he claims, however old it may be. This decision is not affected by the Act (*g*), and consequently an express condition must be inserted if the lease will not be produced. Where the land to be sold is held by underlease, it should be stated to be so held, and must not be represented as being held by lease (*h*). Should any special stipulations as to the title be necessary, they may be conveniently inserted after the condition which we have been discussing.

5th condition. Identity of property.

The 5th condition is necessary when, from the removal of landmarks, such as hedges or walls, it is impossible accurately to identify the component parts, or "parcels," of the property sold with those mentioned in older deeds. It provides that the purchaser shall be satisfied, on this point, by a comparison of the description of the property in the particulars with that in the title-deeds, fortified, if necessary, by statutory declarations of the vendor or of other persons, evidencing long and undisputed possession of the property under those title-deeds. In the absence of express condition to the contrary, the vendor is bound to furnish evidence of identity. If this express condition is inserted, the title deeds must show identity (*i*), otherwise the purchaser is entitled to have some further proof. Hence the provision in the condition for giving the purchaser a statutory declaration, *i.e.*, a statement on oath made by the vendor or some other person under the Statutory Declaration Act, 1835 (*j*).

(*f*) *Frend* v. *Buckley*, L. R. 5 Q. B. 213.
(*g*) See S. 1.
(*h*) Wms. V. & P. 80.
(*i*) *Flower* v *Hartopp*, 6 Beav. 476; *Curting* v. *Austin*, 2 De Sm. 129.
(*j*) 5 & 6 Will. 4. c. 62.

6th condition. Compensation.

The 6th condition provides against the sale being annulled on account of there being any error, mistake, or omission, in the particulars of the property sold. It is either to the effect that in such case compensation shall be given or taken, as the case may be, or else stipulates against any compensation being received, whether by the vendor or by the purchaser. The doctrine of the common law was that misdescription of the property debarred the vendor from obtaining any damages against a purchaser who refused to complete the contract. But, on the other hand, the purchaser, if he wished to fulfil the contract, could not, at law, get any compensation in respect of that part of the property agreed to be sold which he could not obtain. The courts of equity, however, held that, under such circumstances, the contract ought not, in general, to be altogether set aside, but enforced so far as practicable; compensation being given, or taken, for that part of it which could not be performed. This doctrine was carried to a great length in some of the older cases; but it is now settled that a purchaser will not be compelled specifically to perform his agreement, with an abatement in the price, unless he gets substantially what he bargained for (*k*).

But where the purchaser can get that which it was his real object to obtain, he must carry out his contract, taking compensation for the deficiency in value, or even without compensation if the condition provides against there being any compensation at all (*l*). The amount will be fixed according to the actual loss sustained by him, not rateably according to the quantity of the property sold (*m*). A purchaser therefore has been compelled to perform his contract, with an abatement in the price, where a good title could be shown to the whole of a large estate except six acres (*n*); and where a lot sold contained ten acres less than

(*k*) *Jacobs* v. *Revel* [1900] 2 Ch. 858; *Debenham* v. *Sawbridge* (1901) 70 L. J. Ch. 525; *Lee* v. *Rayson* [1917] 1 Ch. 613.
(*l*) *Dyer* v. *Hargrave*, 10 Ves. 505, 507; *Re Fawcett and Holmes* 42 Ch. D. 150.
(*m*) *Hill* v. *Buckley*, 17 Ves. 394.
(*n*) *McQueen* v. *Farquhar*, 11 Ves. 467.

stated (*o*). And the same principle has been applied in a case where the property was not in as good a state of cultivation as represented (*p*). The condition, if worded to give compensation for errors in description of the property, does not apply to misdescription of the title nor defects of the title (*q*). Conversely, a vendor has been compelled to carry out a contract, making compensation, where he contracted to sell a fee-simple in possession, and it turned out to be a fee-simple in remainder (*r*); where the estate was said to contain 217 acres, and wanted 26 acres out of that number (*s*); and where it contained 573 square yards instead of 753 as stated (*t*). In this last case there was a special condition against the vendors' being bound to give compensation; but they appear to have preferred having the purchase completed, even with an abatement in the price, rather than have it rescinded. And it is to be observed that if the deficiency is great, and there is a condition entitling the vendor to rescind the contract if any objection or requisition is persisted in, the purchaser cannot enforce specific performance of the contract, unless he waives his claim to compensation (*u*).

It will be gathered from some of these cases that the insertion of the condition under consideration, whichever way it may be framed, is not allowed to override the rule of equity that a purchaser is only bound to carry out his contract, with an abatement in the price, if he can get substantially that which he bargained for. Still less will the condition be permitted to cover wilful omissions or misstatements. Thus, it has been held that, notwithstanding conditions that no misdescription should annul the sale, but that, in such case, there should be an abatement in the price, a purchaser could

(*o*) *Leslie* v. *Thompson*, 9 Ha. 268.
(*p*) *Dyer* v. *Hargrave*, 10 Ves. 505; *Canada Permanent Building Society* v. *Young*, 18 Grant, 566.
(*q*) *Re Beyfus and Masters*, 39 Ch. D. 110.
(*r*) *Nelthorpe* v. *Holgate*, 1 Coll. 203.
(*s*) *Hill* v. *Buckley*, 17 Ves. 394.
(*t*) *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.
(*u*) *Cordingley* v. *Cheeseborough*, 31 L. J. Ch. 617; *Mawson* v. *Fletcher*, L. R. 6 Ch. 91; *Re Terry and White's Contract*, 32 Ch. D. 14.

not be compelled to complete the purchase where (*v*) property was sold as "freehold," without mentioning that it was subject to restrictive covenants; where (*w*) it turned out that the mines and minerals under the property were reserved to a third person; and, in a case (*x*) of the sale of leasehold property, where the conditions stated that no "offensive trade" could be carried on upon the premises, which were situate in Covent Garden, but concealed the fact that the business of a fruiterer was amongst the prohibited trades. If there is a condition that compensation shall be paid for misdescription, it is advisable to stipulate that it shall apply only to errors of description pointed out before completion (*y*).

7th condition. Payment of the purchase-money.

The 7th condition provides for the payment of the remainder of the purchase-money on a specified day (which should be such as will allow of a fair interval for investigating the title and preparing the conveyance) (*z*), and execution by the vendor, on payment of the purchase-money, of a proper assurance of the property. It is the duty of the purchaser, in any case, and at his own expense, to prepare the conveyance, and tender it to the vendor for execution. The condition, however, goes beyond that, for besides stipulating that the conveyance shall be left, at a fixed time beforehand (usually ten days or so), for perusal by the vendor's solicitors, it proceeds to throw upon the purchaser many expenses which would not, otherwise, fall upon him. Such are those attending the getting in of any outstanding estate or interest, or procuring the execution of the conveyance by any parties other than the vendor, *e.g.*, the cost of the concurrence in the conveyance of a mortgagee (*a*). It will be observed that the vendor is not relieved by this condition from his ordinary duty of getting in such estates or procuring such execution; for it only provides for the expenses attendant on his so doing.

(*v*) *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159.
(*w*) *Upperton* v. *Nickolson*, L. R. 6 Ch. 436.
(*x*) *Flight* v. *Booth*, 1 Bing. N. C. 370.
(*y*) *Wms.* V. & P. 66; *Palmer* v. *Johnson*, 13 Q. B. D. 351.
(*z*) 1 Dav. Con. 612, note (*u*).
(*a*) *Re Sander and Walford's Contract* (1900) 83 L. T. 316.

8th condition Rents and outgoings.

The 8th condition provides that the rents and possession shall be received and retained, and the outgoings paid, by the vendor up to the day fixed for completing the purchase, after which date both the benefit and the liabilities of the property are to devolve upon the purchaser; the rents and outgoings being, if necessary, apportioned between the parties.

The effect of the 8th condition, coupled with the previous one, is to raise implied covenants, by the vendor and purchaser respectively, that, on a specified day, the purchase shall be completed, by execution of the conveyance on the one side, and payment of the purchase-money on the other. But since the covenants are mutual, it follows that a purchaser cannot claim possession of the property unless he is ready to pay the purchase-money, nor can the vendor claim payment unless he has shown a good title to the property. At law, the party not ready, on the specified day, to perform his part of the contract lost all his rights under the contract. But, if he were subsequently ready to carry it out, equity would enforce specific performance of it, at his suit; unless there had been an express condition as to time being of the essence of the contract (*b*); or unless the nature of the property, *e.g.*, a mining lease or a short leasehold (*c*), or the known object of one of the contracting parties for entering into the contract, *e.g.*, property required for trade or business purposes, as on the purchase of a manufactory as a going concern or purchase of a public house (*d*), made time "of the essence of the contract." And even in those cases specific performance would be enforced if the Court could gather from the wording of the contract that the parties contemplated the possibility of the purchase being completed on a day later than that named for the purpose (*e*). Under the Judicature Act, 1873 (*f*), the rules

(*b*) *Hudson* v. *Temple*, 30 L. J. Ch. 251.
(*c*) *Hudson* v. *Temple*, 30 L. J. Ch. 251; *Coslake* v. *Till*, 1 Russ. 376.
(*d*) *Parker* v. *Frith*, 1 S. & S. 199; *Powell* v. *Marshall Parkes & Co.* [1899] 1 Q. B. 710.
(*e*) *Webb* v. *Hughes*, L. R. 10 Eq. 281; *Patrick* v. *Milner*, 2 C. P. D. 342.
(*f*) 36 & 37 Vict. c. 66, s. 25, sub-s. 7.

of the courts of equity as to time being of the essence of the contract obtain in all the courts.

9th condition. Interest on purchase-money.

The 9th condition provides that if "from any cause whatever" any purchase shall not be completed on the specified day, the purchaser shall pay a fixed rate of interest on all money due from him, until completion; and shall not be entitled to actual possession until such completion, nor to any compensation for the vendor's delay, or otherwise. In the absence of such a condition, a purchaser is liable to pay interest on his purchase-money from the time only when he has taken, or might safely have taken, possession of the property (*g*). And if there is no such condition and there is a delay in completion, arising from the vendor's fault, and the purchaser has not taken possession of the estate, he may elect whether he will pay interest on his purchase-money from the day fixed, charging the vendor with the rents and profits of the estate, or whether he will waive his right to the rents and profits and pay no interest. But if he has taken possession he must pay interest as from that date, even though there are no rents or profits (*h*). In cases where the above condition is inserted, some little hesitation appears to have been felt at one time by the Court of Chancery as to enforcing it where the delay did not arise from any fault of the purchaser. In one case it was suggested that a purchaser paying interest under such circumstances was entitled, notwithstanding the condition, to receive from the vendor compensation for non-performance of the latter's part of the contract (*i*). But it is now settled that the mere existence of difficulties in the title, although justifying the purchaser in refusing to complete until they are removed, does not exempt him from the condition respecting payment of interest (*j*). And he will only be entitled to the clear rents and profits actually received,

(*g*) *Binks* v. *Rokeby*, 2 Swan, 222; *Jones* v. *Mudd*, 4 Russ. 118.
(*h*) *Ballard* v. *Shutt*, 15 Ch. D. 122; *Fletcher* v. *Lancashire, &c., Rail. Co.* [1902] 1 Ch. 901.
(*i*) *De Visme* v. *De Visme*, 1 M. & G. 336, 347.
(*j*) *Williams* v. *Glenton*, L. R. 1 Ch. 200; *Re Bayley-Worthington & Cohen's Contract* [1909] 1 Ch. 648.

without any claim for compensation. But he may charge the vendor with an occupation rent, if the latter remains in actual occupation of the property (*k*). If this condition is inserted, the purchaser cannot apparently discharge himself from his liability to pay interest by appropriating his money to the purchase by lodging the purchase money at a bank in the manner described hereafter (*l*).

The condition, however, will not be enforced by the Court where there has been gross misconduct or wilful delay on the part of the vendor (*m*). Sometimes the condition is so worded as to bind the purchaser to pay interest in case of delay in completion from any cause other than wilful default of the vendor. What will amount to wilful default depends on the circumstances of each particular case (*n*). Thus it was held wilful default for the vendor to go abroad two days before the date fixed for completion (*o*). It may be added that if the vendor remains in possession he is bound to keep the property in repair (of course at the purchaser's expense), and that the purchaser may set off against the interest payable by him the amount of any extra deterioration arising from the vendor's neglect in this respect (*p*).

10th condition. Objections and requisitions.

The 10th condition is one which occasionally gives rise to disputes between vendors and purchasers, but its proper construction is now tolerably well settled. It provides that each purchaser shall send in his objections and requisitions, in respect of the title and of all matters appearing on the abstract, particulars, or conditions of sale, within a limited time from the date of the delivery of his abstract; that, in this respect, time shall be of the essence of the contract; and

(*k*) See as to this, *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517.
(*l*) *Re Riley to Streatfield*, 34 Ch. D. 386.
(*m*) *Esdaile* v *Stephenson*, 1 S. & S. 122.
(*n*) Wms. V. & P. 68.
(*o*) *Re Young and Harston's Contract*, 31 Ch. D. 168; see also *Re Hetling and Merton's Contract* [1893] 3 Ch. 269; *Bennett* v. *Stone*, [1903] 1 Ch. 509.
(*p*) *Philipps* v. *Silvester*, L. R. 8 Ch. 173. See also *Egmont* v. *Smith*, 6 Ch. D. 469.

that in default of such requisitions or objections the purchaser shall be deemed to have accepted the title. The condition is sometimes so worded as to fix times for the various matters consequent on sending in requisitions, such as that for making further requisitions, and so on; but this mathematical accuracy can seldom be attained in practice, and an attempt at it is very likely to lead to difficulties.

The abstract delivered must be a "perfect" abstract; that is, an abstract as perfect as the vendor can make it at the time, one which sets out truly and sufficiently every document forming a link in the vendor's title, although it may not show a complete title; and if this is done, time will begin to run against the purchaser from the delivery of the abstract, although it shows a defective title (*q*). He is not bound by the condition if the abstract shows that the vendor has in fact no title; as where (*r*) trustees profess to sell under a power of sale which the abstract shows not to have arisen; for, in such a case, the abstract of itself points out that the purchaser is entitled to rescind the contract. Neither is the condition as to time being of the essence of the contract binding on a purchaser, if a day is fixed for delivering the abstract, and it is not delivered on that day. It has been laid down that in such a case the time for taking the objections, and the mode in which they are to be considered as waived, should depend upon the general principles of equity (*s*). No precise rule appears to exist as to what would be considered a proper time, but it is clear that an unreasonable length of time in delivering the abstract may entitle the purchaser to rescind the contract altogether (*t*).

The condition goes on to provide that if the purchaser shall insist on any objection or requisition, as to the title, particulars, or conditions, which the vendor is unable, or

(*q*) Wms. V. & P. 62.
(*r*) *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Re Tanqueray Willaume and Landau*, 20 Ch. D. 465.
(*s*) *Upperton* v. *Nickolson*, L. R. 6 Ch. 436, 443.
(*t*) *Venn* v. *Cattell*, 27 L. T. 469.

unwilling, to remove, or comply with, the vendor may, by notice in writing, rescind the contract, notwithstanding any negotiation or litigation in respect of the requisitions; and shall thereupon return the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever. The power of rescinding the contract, when allowed, extends to requisitions or objections made in respect of matters arising subsequently to the delivery of the abstract, and not appearing on the original abstract (*u*). But it would seem that the "unwillingness" of the vendor to comply with requisitions must in any case be reasonable (*v*).

If the purchaser has insisted on requisitions which he knows the vendor cannot comply with, the latter may at once rescind the contract, without giving him further time in which to waive his requisitions (*w*). But the very wording of the condition shows that the mere fact of a requisition being made does not allow the vendor immediately to rescind the contract (*x*). Nor can he, under colour of such a condition, evade compliance with reasonable requisitions, nor rescind against a purchaser who is willing to waive his objections to the title and take the property without an abatement in price. And a vendor who has failed to show any title whatever to the property cannot, by purporting to rescind under this condition, escape his liability to recoup to the purchaser the expenses to which the latter has been put in investigating the title (*y*). The value of the condition consists in enabling a vendor who has, in fact, a good title, and who has duly per-

(*u*) *Gray* v. *Fowler*, L. R. 8 Ex. 249.

(*v*) *Mawson* v. *Fletcher*, L. R. 6 Ch. 91, 94; *Gray* v. *Fowler*, L. R. 8 Ex. 249, 265, but see *S. C.* p. 273; *Re Jackson and Haden's Contract* [1906] 1 Ch. 412; *Re Weston and Thomas's Contract* [1907] 1 Ch. 244.

(*w*) *Duddell* v. *Simpson*, L. R. 2 Ch. 102.

(*x*) The condition, however, may be so worded as to allow the vendor to rescind on any requisition which the vendor is unwilling to answer being made, in which case the vendor can rescind on the first delivery of such a requisition: *Re Starr-Bowkett Building Society and Sibun's Contract*, 42 Ch. D. 375.

(*y*) *Bowman* v. *Hyland*, 8 Ch. D. 588; *Re Deighton and Harris's Contract* [1898] 1 Ch. 458; *Re Jackson and Haden's Contract* [1906] 1 Ch. 412.

formed his duties under the contract, to rescind upon a requisition being insisted on, which is either frivolous or untenable, or with which, on the ground of expense, or other sufficient cause, he cannot reasonably be expected to comply (*z*).

11th condition. Forfeiture of deposit.

The 11th condition provides that if any purchaser fail to comply with the conditions, his deposit shall be thereupon forfeited, and that the vendor may proceed to resell the property; the purchaser being liable for all expenses attending the resale, as well as for any deficiency in the price so obtained. Even in the absence of such a condition, the purchaser will forfeit his deposit if he improperly refuses to complete his contract (*a*); still more will this be the case where the condition exists. But the amount of the deposit would probably be taken into consideration in estimating the damages which the vendor had sustained by the purchaser's breach of contract. The chief advantage of the condition is that it enables the vendor to resell the estate at once, instead of having to apply to the Court for that purpose, as he would have to do were there no stipulation upon the subject (*b*); it also prevents any questions being raised as to his right to forfeit the deposit.

Condition as to unstamped documents and unregistered documents.

Whenever it is known or apprehended that any document of title executed before or on the 16th of May, 1888, is or may be unstamped or insufficiently stamped, a condition should be inserted that no objection or requisition shall be made on that account, and that if the purchaser shall require any such document to be stamped or further stamped, such stamping shall be effected by him at his expense. By the Stamp Act, 1891, s. 117 (*c*) such a condition, if made as to documents executed after the 16th of May, 1888, is void. If the lands sold are in Middlesex or Yorkshire, it is usual to

(*z*) Wms. V. & P. 64.
(*a*) *Ex parte Barrell*, L. R. 10 Ch. 512; *Hall* v. *Burnett* [1911] 2 Ch. 551.
(*b*) Wms. V. & P. 51—4.
(*c*) 54 & 55 Vict. c. 39, s. 117, re-enacting 51 & 52 Vict. c. 8, s. 20.

extend this condition of sale by a provision that no objection or requisition shall be made on the ground of the non-registration in the County Register of any document which might or ought to have been so registered.

Memorandum of sale.

Attached to the conditions of sale is the memorandum referred to in the second condition. The form of this often provides for the auctioneer signing as agent for "the vendor" without naming him, but having regard to the provisions of the Statute of Frauds (*d*), it is necessary for the name of the vendor to appear on the memorandum of sale, unless he is named in the conditions of sale or in the particulars annexed to them, or, if not actually named, so described that there can be no reasonable doubt as to his identity (*e*).

Besides these ordinary conditions of sale, there will have to be inserted, in almost every case, special conditions rendered necessary by the nature of the title or of the property to be sold. Into these we do not propose to enter. Their number is, practically, infinite; and little advice can be given beforehand as to their preparation, since this varies with each case. But a careful study of the conditions ordinarily employed, and of the principles on which they are construed by the Courts, will form a solid foundation on which to construct these more complicated forms of drafting.

Sales by private contract.

On an agreement for sale of land by private contract there is more opportunity for bargaining as to the provisions of the contract of sale. If the purchaser's adviser objects to one of the stipulations inserted on behalf of the vendor, the latter can withdraw or modify it; and the same applies to any stipulation inserted on behalf of the purchaser. As stated above, it is, on the whole, a disadvantage for a vendor to sell by open contract. Hence the vendor's adviser should insert stipulations as in sales by auction, although, of course, condition No. 1 would not apply—its place would be taken by a clause setting out the names of the vendor and pur-

(*d*) 29 Car. II. c. 3.

(*e*) See *Sale* v. *Lambert*, L. R. 18 Eq. 1; *Potter* v. *Duffield*, L. R. 18 Eq. 4. *Commins* v. *Scott*, L. R. 20 Eq. 11; *Catling* v. *King*, 5 Ch. D. 660; *Lavery* v. *Pursell*, 39 Ch. D. 518; *Coombs* v. *Wilks* [1891] 3 Ch. 77.

chaser, the consideration and the particulars of the property to be sold. The stipulations may even be made more stringent than the common form conditions on sale by auction, *e.g.*, a provision may be inserted that the purchaser shall pay the cost of getting in any outstanding estate or of the concurrence in the conveyance of any necessary parties besides the vendor; and it may be provided that if the contract is not completed on the date fixed, the purchaser shall pay five per cent., or a higher rate, on the balance of the purchase money, even though the delay in completion is due to any cause whatsoever. On the other hand, the draftsman acting for the purchaser should endeavour to obtain a modification of these stipulations. Thus he might object to the clause as to the payment of a deposit, or at all events should insist that it be paid to a stakeholder and not to the vendor himself or to the vendor's solicitor as agent for the vendor. He should endeavour to throw on the vendor the cost of proving evidence of title not in the vendor's possession. He should strike out of the draft contract any proviso throwing on the purchaser the cost of getting in the outstanding legal estate. He should stipulate that, if delay in completion is due to any cause other than the fault of the purchaser, the purchaser, on payment of the purchase money or the balance thereof into a deposit account at a bank, shall not be liable to pay interest. He may also object to any stipulation limiting his right to require evidence of identity. If the private contract provides that the title shall begin with a deed less than forty years old, the purchaser should require the vendor to give an express undertaking that such deed is a good root of title. This would probably entitle the purchaser to recover his deposit if, in fact, a good root of title is not shown (*f*).

Effect of the Contract Pending Completion of Sale.

Position of the parties after date of the contract.

After the date of the contract the purchaser becomes the equitable owner of the land, the vendor having, however, a lien on the property for the purchase money, and a right to

(*f*) Wms. V. & P. 89.

retain possession of it until the purchase money is paid. Until completion of the purchase the vendor must exercise the same care over the property sold as a trustee must with regard to the property subject to his trust (*g*). He must, therefore, take proper precautions to prevent injury to the land by trespassers, and if such injury be done he must pay compensation to the purchaser (*h*).

Until the proper time for completion of the purchase (that is, the time fixed in the contract for completion or, on open contract, the time when a good title shall have been shown), the vendor takes the rents and profits of the land for his own use, discharging all outgoings. But all risks fall on the purchaser, and the purchaser takes the benefit of all benefits accruing, or improvements casually happening thereto. Thus, if a house is sold and it is burnt down before completion of the sale, the loss falls on the purchaser. It is advisable, therefore, for the purchaser to stipulate that he is to have, from the date of the agreement, the benefit of any policy by which the property is insured against fire, and the consent of the insuring office to such arrangement should be obtained, for otherwise, if the house be burnt down and the vendor receive the insurance money and hand it over to the purchaser, or lay it out in rebuilding at the purchaser's request, he will be liable, on receiving the full purchase money at the completion of the sale, to refund to the insurance office the amount paid by them, because a contract of fire insurance is a contract of indemnity (*i*). If no such stipulation as to the insurance policy be inserted, and the house is burnt down before the purchase is completed, the purchaser will still have to pay for it, but will not be entitled to the insurance money, and the vendor will thus get both it and the purchase money, subject to the right of the insurance company to make him repay the former (*j*). If a house sold has been insured by the vendor and burnt down before

(*h*) *Clarke* v. *Ramuz* [1891] 2 Q. B. 456.
(*g*) Wms. V. & P. 89.
(*i*) Wms. V. & P. 509; *Castellain* v. *Preston*, 8 Q. B. D. 613.
(*j*) *Rayner* v. *Preston*, 18 Ch. D. 1.

the completion of the contract, it is doubtful whether the purchaser can require the insurance money to be laid out in rebuilding under the Fires Prevention (Metropolis) Act, 1774 (*k*) (by which persons interested in premises damaged by fire can require the insurance office to apply the insurance money in reinstatement), unless the vendor has expressly agreed to give him the benefit of the insurance or to lay out the money in reinstatement (*l*).

The vendor, until the proper time for completion of the contract, must keep the property in a reasonable state of repair. After the proper time for completion, if the vendor still remains in possession, the purchaser is entitled to claim from the vendor the rents and profits, but the outgoings fall upon the purchaser. If the delay is due to the fault of the purchaser, he is not entitled to compensation for any deterioration the property may suffer after that date. After the proper time for completion of the purchase, the purchaser is liable to pay interest on the balance of the purchase money (see above, p. 30, and p. 44).

Effect of death of either party.

If the vendor dies before completion of the purchase, his rights and liabilities pass to his executors or administrators, who are the proper persons to sue on the contract, and, if the property is leasehold, they could always convey it to the purchaser. If the property is freehold fee-simple, the heir or devisee had formerly to convey the estate to the purchaser. By the Conveyancing Act, 1881 (*m*), if the vendor died after 1881, his legal personal representative could complete the contract by conveying the legal estate to the purchaser, but only if there was a contract of sale enforceable against the heir or devisee. By the Land Transfer Act, 1897 (*n*), freehold estates of inheritance vest on the death of the owner in his personal representatives, and they can be compelled to convey. Under the wording of the Act it was

(*k*) 14 Geo. 3, c. 78, s. 83.
(*l*) *Westminster Fire Office* v. *Glasgow Provident, &c., Society*, 13 App. Cas. 716; *Sinnott* v. *Bowden* [1912] 2 Ch. 414; Wms. V. & P. 511.
(*m*) 44 & 45 Vict. c. 41, s. 4.
(*n*) 60 & 61 Vict. c. 65, s. 1.

held that it was necessary for all the executors to join in the conveyance, except those who had expressly renounced probate (*o*); but the Conveyancing Act, 1911 (*p*), provides that the executors who have proved the will can convey. The Act of 1911 applies to all dispositions made after 1911. If the executors or administrators have assented to a devise or conveyed the land to the heir, the purchaser takes his conveyance from the devisee or heir. If the property sold is the legal interest in copyhold (*i.e.*, the deceased had been admitted as tenant on the Court rolls), it is still necessary for the heir or devisee to convey, as the Act of 1897 does not apply to the legal estate in copyholds. If, however, the vendor was the equitable owner only of the copyholds, his personal representatives can convey, as the Land Transfer Act, 1897, applies to equitable estates in copyholds (*q*).

If the vendor was a trustee or mortgagee and the land he agreed to sell is leasehold or freehold, his personal representatives can convey the land, the leaseholds under the common law and the freeholds by virtue of section 30 of the Conveyancing Act, 1881 (*r*). The personal representatives need not all join in the conveyance. But if the trust or mortgage property is copyhold and the vendor had been admitted as tenant on the Court rolls, his customary heir or devisee must complete the purchase (Copyhold Act, 1894 (*s*)). If he had not been admitted, his personal representatives can complete.

If the vendor was a tenant in tail, and he dies before barring the entail, his estate passes to his heir in tail, who cannot be compelled to complete the contract, but the executor of the vendor can be sued for damages for breach of contract to make a good title (*t*). If, however, a tenant in tail agrees to sell the land under the Settled Land Act, 1882 (*u*), and

(*o*) *Re Pawley and the London and Provincial Bank* [1900] 1 Ch. 58.
(*p*) 1 & 2 Geo. 5, c. 37, s. 12.
(*q*) *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.
(*r*) 44 & 45 Vict. c. 41, s. 30.
(*s*) 57 & 58 Vict. c. 46, s. 88.
(*t*) Wms. V. & P. 532. (*u*) 45 & 46 Vict. c. 38, s. 58.

he dies before completion, the contract can be enforced against all persons entitled to the land on his death under the settlement by which he held the land as tenant in tail (*v*). If the vendor was a tenant for life under a settlement, and agreed to sell the fee-simple under the Settled Land Act, 1882, the contract is binding on, and can be enforced by, his successor in title (*w*).

If the purchaser dies before completion of the purchase, his personal representatives can sue for damages at law for breach of the contract and are liable to be sued for payment of the purchase money. If an action is brought for specific performance of the contract, the personal representatives of the purchaser and his devisee should be made parties to the action. The heir or devisee of the purchaser takes the land subject to the vendor's lien and cannot call upon the purchaser's personal representatives to pay the purchase money out of the general personal estate (Real Estate Charges Acts, 1854, 1867 and 1877 (*x*)) unless the purchaser *devises* the land and expresses a contrary intention in his will. But these Acts do not affect the right of the vendor to obtain payment from the purchaser's personal representatives out of all the purchaser's assets, real or personal.

Bankruptcy.

If the vendor becomes bankrupt before completion of the contract, his trustee in bankruptcy can enforce the contract against the purchaser, and the purchaser can enforce the contract against him. The vendor's trustee in bankruptcy cannot disclaim the contract unless he also disclaims the land sold as onerous property (as he might in the case of leaseholds). If the trustee in bankruptcy of the vendor should so disclaim the property, the purchaser's equitable interest therein would be unaffected and he might apply to the Court for an order vesting the estate in him (*y*). If the purchaser becomes bankrupt, his trustee in bankruptcy

(*v*) 45 & 46 Vict. c. 38, s. 31 (2).
(*w*) Wms. V. & P. 539.
(*x*) 17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.
(*y*) *Re Bastable* [1900] 2 K. B. 518; Bankruptcy Act, 1914 (2 & 3 Geo. 5, c. 59), s. 54.

has the right to disclaim the contract, in which case the vendor cannot enforce specific performance, but he can retain any deposit paid and prove in the purchaser's bankruptcy as a creditor for any damage suffered by him in consequence of the disclaimer. The purchaser's trustee in bankruptcy, if he is prepared to pay the full purchase price, can enforce the contract against the vendor (*z*).

Abstract of Title.

Contents of abstract.

The vendor must make at his own expense and deliver to the purchaser an abstract of title to the property sold. If, in order to make a proper abstract, the vendor requires the production of documents not in his possession, he must bear the expense of obtaining such documents. The Conveyancing Act, 1881, s. 3 (6) (*a*) does not relieve him from this obligation (*b*). The abstract of title consists of connected summaries of the deeds, wills or other instruments which show the vendor's title to the property to be sold. It should also contain a statement of every birth, death, marriage or other event material to the devolution of the property during the period for which title is to be shown.

Root of title.

The abstract should begin with a good root of title, *i.e.*, some transfer of the property dealing with the whole legal and equitable estate in the property sold, describing the land and showing nothing to cast any doubt on the title. If the instrument be deficient in any of these particulars, the purchaser may require further evidence to supply the deficiency. Thus a conveyance of the fee simple on a sale or a legal mortgage is a good root of title; but if the abstract begins with a will containing a general devise, the purchaser is entitled to require evidence that the vendor owned the land in fee-simple at the date of his death, unless the conditions of sale expressly provide that the purchaser is not to demand such proof. An equitable mortgage or the conveyance of an

(*z*) Wms. V. & P. 552.
(*a*) See above p. 28.
(*b*) *Re Johnson and Tustin*, 30 Ch. D. 42.

equity of redemption (*i.e.*, of land subject to a legal mortgage), are bad roots of title as they do not prove the ownership of the legal fee-simple. A deed exercising a power of appointment is not a good root of title, as a person may have a power over land of which he is not the owner; the instrument creating the power must be produced. A disentailing deed is a bad root of title for the same reason, as it only shows the ownership of an estate tail and this, like a power of appointment, is merely a derivative interest and not full ownership. The deed creating the estate tail should be abstracted (*c*).

Misleading condition as to root of title.

Although a purchase deed or mortgage deed is the most satisfactory root of title, because, presumably, the prior title was investigated at the time of such sale or mortgage, yet a voluntary conveyance or a family settlement transferring the legal estate is a sufficient root of title if made by deed at least forty years old; and a will containing a specific devise is a good root of title if the testator died at least forty years before the present sale. But if the contract of sale expressly limits the time for which title is to be shown to a period less than the forty years which can be claimed by law on open contract to sell land, the contract must state clearly the nature of the instrument with which the title is to commence. Otherwise the condition is "misleading" and the vendor cannot obtain specific performance of the contract. Thus if the contract states that the title is to begin with "an indenture" less than forty years old, the purchaser is entitled to assume that the deed was made on an occasion on which the title would be investigated, and if the indenture proves to be a voluntary conveyance or a deed of enfranchisement of copyholds, the vendor cannot obtain specific performance, but yet the purchaser cannot claim back his deposit and damages, because these are common-law remedies, and at common law he is bound by the words of the contract (*d*).

(*c*) Wms. V. & P. 108.
(*d*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.

Recital as a root of title.

In *Bolton* v. *London School Board* (*e*), Malins, V.C., held that a deed twenty years old, containing a recital that the grantor was seised in fee-simple, was a good root of title, owing to the provisions of the Vendor and Purchaser Act, 1874 (*f*), that recitals contained in a deed twenty years old at date of the contract shall, except so far as they are proved to be inaccurate, be taken to be sufficient evidence of the facts stated therein. But this decision is generally regarded as erroneous, and was dissented from in *Re Wallis and Grout's Contract* (*g*).

What the abstract should set out.

After the document forming the root of title there should be abstracted every subsequent document which deals with the legal estate in the property sold, except expired leases. Thus a legal mortgage should be set out, even if the mortgage had been paid off and the land reconveyed. But trusts affecting any prior sale, or money lent on mortgage, of the property, if such trusts are contained in separate documents, are not usually placed on the abstract, as it is desired to "keep the trusts off the title." Equitable mortgages by deposit of title deeds or agreement in writing not under seal which have been discharged by payment are not abstracted. A mortgage of an equity of redemption, or second mortgage, created by deed should be set out in the abstract, even if it has been paid off, because it might have transferred the legal estate if the legal estate should not have passed by the prior mortgage (*h*).

Verification and proof of the abstract.

The vendor must verify the abstract by producing all the evidence necessary to prove the statements therein. He produces (usually at the office of his solicitor) for the examination of the purchaser or his solicitor all the abstracted deeds and furnishes proof of all other documents and facts on which the title depends, such as wills, orders of the Court, births, marriages and deaths. By the Conveyancing Act, 1881 (*i*), the purchaser, in the absence of

(*e*) 7 Ch. D. 766.
(*f*) 37 & 38 Vict. c. 78, s. 2.
(*g*) [1906] 2 Ch. 210.
(*h*) Wms. V. & P. 110—11
(*i*) 44 & 45 Vict. c. 41, s. 3 (6).

agreement to the contrary, must pay the cost of producing evidence not in the vendor's possession. The vendor verifies the abstracted deeds by producing the original documents. In practice it is not usual for the purchaser to require evidence of the execution of the documents of title, even if such documents be not thirty years old, if they are found in proper custody. If a deed has been executed under a power of attorney, the purchaser can demand that the power of attorney shall be produced, and, if the power was created before 1883, proof that the power was not revoked by the donor's death or otherwise before the power was exercised. But by the Conveyancing Act, 1881 (*j*), such evidence is not necessary (1) where the power was given by an instrument executed after 1882 for valuable consideration and expressed to be irrevocable; (2) where the power was given by an instrument executed after 1882, whether for valuable consideration or not, and expressing that the power should be irrevocable for a fixed term, not exceeding one year, and the power was acted upon within that time.

Powers of attorney.

Proof of documents.

Copyhold assurances are proved by copies of the court roll, signed by the steward. Disentailing deeds are proved by certificates of enrolment. Wills of realty are proved by production of probate or letters of administration with the will annexed, or office copies thereof; or, if the will should not have been proved, *e.g.*, if the testator died before January 1, 1898 (when the Land Transfer Act, 1897, came into force), by production of the will itself. Enfranchisement of copyholds is proved by production of the deed or award of enfranchisement. Private Acts of Parliament are proved by production of King's printer's copy. Orders of the Court are proved by office copy. Registration of assurances in Middlesex and Yorkshire is proved by certificate of registration indorsed by the registrar on the deed. If a document is missing, its destruction or loss must be proved by evidence of actual destruction, or by showing that proper searches have been made for it without result.

(*j*) 44 & 45 Vict. c. 39, s. 8.

Proof of facts.

As to the proof of facts, as distinct from the documents stated in the abstract, births, marriages and deaths, and matters of pedigree are proved by certificates of birth, marriage and burial (a certificate of death appears not to be sufficient), or, if these cannot be found, by statements of deceased members of the family, or entries in a family Bible, or statutory declaration of living members of the family or strangers acquainted with the family. It should be pointed out here that a statutory declaration of a living member of the family as to a matter of pedigree may become good evidence after his death, but is not admissible evidence in litigation during his lifetime; and that a statutory declaration of a stranger to the family is never admissible evidence in litigation; but on sale of land, such evidence is commonly accepted by conveyancers. A statutory declaration is a solemn declaration made under the provisions of the Statutory Declarations Act, 1835 (*k*).

Statutory declaration.

Proof of payment of duty, bankruptcy, seisin, and intestacy.

Payment of succession duty is proved by production of the receipt for the duty; and payment of estate duty is proved by the certificate of discharge of the duty (*l*). An adjudication in bankruptcy is proved by production of a copy of the "London Gazette," containtaining a notice thereof. Seisin is proved by evidence of acts of ownership, such as grants of leases, or by proof of assessment to the poor rate or land tax. Intestacies are proved by production of letters of administration.

Proof of negative facts.

It may be necessary to prove that certain events, which would have affected the title had they occurred, did not happen, *e.g.*, that a previous owner of the land died without issue, or that a voluntary settlement containing a power of revocation was not revoked. Death without issue may be proved by declaration of some person well acquainted with the deceased. The non-revocation of a voluntary settlement may be proved by evidence of long possession under the settlement, coupled with the declaration of the settlor's solicitor that

(*k*) 5 & 6 Will. 4, c. 62. See Precedent XLIV.
(*l*) Wms. V. & P. 1322.

he had never heard of any revocation of the settlement (*m*), or by a recital in a conveyance at least twenty years old (*n*). The happening of certain other events might or might not affect the title, *e.g.*, the vendor might have married and made a marriage settlement of the property he has now agreed to sell. The vendor must answer any question as to whether an event which might or might not have affected the title has occurred. If he replies that it did not, the purchaser cannot require any further evidence except possibly a statutory declaration by the vendor at the purchaser's expense. If he replies that the event happened, but did not affect the property sold, then the purchaser may require such evidence of this statement as is in the vendor's possession. If the purchaser is informed of the existence of a document, and is told that it did not affect the property sold, he is not considered to have constructive notice of any equitable interest created by the document; but if the document is in the possession of the vendor, he should ask for it to be produced for his solicitor's examination, as it may have created a legal interest in the property purchased (*o*). The purchaser may be called on to presume certains facts, *e.g.*, in one case (*p*) it was presumed that a mortgage debt had been paid off and the land reconveyed, although the reconveyance could not be produced, on proof that the land had been in the possession of the vendor and his predecessors in title for a very long period since the date of the mortgage, that the mortgage was not mentioned subsequently in the title deeds, and that the vendor had been in possession of the title deeds for the last twenty-five years without any claim being made on him for principal and interest. But where the title to land sold depends upon the fact of a death having occurred, and no evidence of the death can be procured, the purchaser is not bound to accept a presumption of death from the fact that the person whose death it is necessary to prove has not been heard of for the last seven years by those who would naturally have heard of or from him if he had been alive (*q*).

Presumptions.

(*m*) *Re Marsh and Earl Granville*, 24 Ch. D. 11, 19.
(*n*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 3 (3).
(*o*) Wms. V. & P. 134—6.
(*p*) *Cooke* v. *Soltau*, 2 S. & S. 154.
(*q*) Wms. V. & P. 156.

Advising on Title. Requisitions on Title and Answers thereto.

Objections to title and requisitions.

The purchaser, or his legal adviser, is entitled, subject to the provisions of the contract, to put written requisitions and objections in regard to any defect in the title as appearing on the abstract or disclosed by examination of the deeds, and the vendor must make a satisfactory answer to such requisitions in order to show a good title. What requisitions should be put depends, of course, upon the particular title shown in the individual case, and also upon whether the sale is by open contract or whether the purchaser's right to put requisitions on the title is expressly restricted by the conditions of sale. Speaking generally, the conveyancer acting for the purchaser should call for proof of the vendor's title in accordance with the rules mentioned above; he should note whether there are any defects in the form of the abstracted documents; whether any equities or breaches of trust are disclosed; whether there are mortgages or other charges abstracted or referred to in the documents of title; whether the documents are properly stamped. He should consider whether the instrument with which the title commences is a sufficient root of title under the contract, and whether the title is regularly deduced down to the vendor without a break. Thus if the abstract shows that the land was mortgaged, and that the mortgage was afterwards paid off, but does not state that the land was reconveyed, the conveyancer should call for the reconveyance. He should consider whether the persons who, as shown in the abstract, transferred the property had the power to transfer (see later page). If it appears that any person died owning the land now being sold within the last twelve years, proof should be demanded that succession duty and estate duty was duly paid. The vendor need not show that the whole estate sold is vested in himself. It is sufficient if he can show that he can convey, or cause others to convey, to the purchaser the estate he has agreed to sell. Thus, if the land sold is vested in trustees holding on trust for the vendor absolutely, a good title is

shown, for the vendor can direct the trustees to convey as he will. If the land sold is subject to a mortgage, the vendor can show a good title if he is in a position to redeem the mortgage at once (*e.g.*, if he has given the usual six months' notice or has paid six months' interest in advance in lieu of such notice), but not if the land sold is subject to a mortgage, which is not to be called in or paid off during a certain time. So, too, a tenant for life under the Settled Land Acts, 1882-90, can convey the fee-simple. But if the title is in some third person whose conveyance the vendor has no right, legal or equitable, to direct, the purchaser can object to the title, even though the vendor offers to obtain the concurrence of such third person and the latter is willing to give it (*r*). Thus two persons sold land as trustees for sale. The abstract of title showed that the trust for sale did not arise until the death of a tenant for life, who was still living. The vendor thereupon offered to procure a conveyance from the tenant for life under the Settled Land Acts; but the purchaser refused to accept a conveyance from the tenant for life, and the Court held that he was justified in his objection, as he had made no contract with the tenant for life, and the trustees had no power to compel the concurrence of the tenant for life, although he was willing to give it (*s*). But in another case (*t*), where trustees, who had no power to sell under the trust instrument, had entered into a contract to sell at the request of all the beneficiaries, it was held that the purchaser could not refuse to complete, as the trustees were acting as the authorised agents of the beneficiaries and could compel the beneficiaries to concur.

Succession duty.

In regard to payment of death duties, it may be pointed out that succession duty is payable on any beneficial interest in freehold, copyhold, or leasehold, or pure personalty settled otherwise than by will, accruing to one person on death of another. The rate of duty varies with the relationship of the successor to the predecessor. If a succession,

(*r*) Wms. V. & P. 167.
(*s*) *Re Bryant and Barningham's Contract*, 44 Ch. D. 218.
(*t*) *Re Baker and Selmon's Contract* [1907], 1 Ch. 238.

before falling into possession, has become vested by alienation in any other person, the duty is payable just the same as if no such alienation had been made, and the duty is a first charge on the interest of the successor, and of all persons claiming in his right in all the real property and leasehold in respect whereof such duty is assessed. Therefore if land is settled on A for life, remainder to B in fee-simple, and B is selling his fee-simple in A's lifetime to C, C cannot, unless he specially stipulated to that effect, require the vendor to procure such duty to be commuted or to discharge it when it falls due on A's death, for the tax is regarded as an incident of the estate, and not as an incumbrance (*u*). But if the land is sold by trustees who are selling under a trust for sale, or a tenant for life is selling the fee-simple under the Settled Estates Act, 1877, or the Settled Land Acts, 1882-90; the purchaser is not concerned to see to the payment of succession duty, as it will be a charge on the purchase money and not on the land sold (*v*).

Estate duty

In addition to succession duty, all property, real or personal, settled or unsettled, which passes on the death of anyone dying after the 1st day of August, 1894, is liable to estate duty, the rate of duty varying according to the net aggregate of the property (*w*). The estate duty is a charge on the property if it does not pass to the executors as such. Therefore a purchaser of leaseholds is not concerned with the question whether the duty has been paid; but a purchaser of realty must see that the duty has been paid, whether the vendor is a beneficial owner, a tenant for life. selling under the Settled Estates Act, 1877, or Settled Land Act, 1882, or a trustee selling under a trust or power of sale, or an executor or administrator. If, however, twelve years have elapsed since the death, the purchaser is protected, since the estate duty will be barred. But as no estate duty, which may become payable on a future death, is charged on any lands, a purchaser of lands settled on one for life, with

(*u*) Wms. V. & P. 1285.
(*v*) Wms. V. & P., p. 1269, *et seq.*
(*w*) Finance Acts, 1894-1919; 57 & 58 Vict. c. 30.

remainder over, will take the lands free from any charge in respect of the estate duty, if any, which will become payable on the death of the tenant for life. But if a remainder or reversion expectant on the determination of a life interest, other than a lease for lives, be sold by itself and apart from the life interest, estate duty will become payable in respect of the property on the death of the tenant for life; and it appears that the purchaser will take subject to the liability and must bear the expense of the duty, in the absence of stipulation to the contrary (*x*).

Requisitions on certain specific points.

A few other specific points as to requisitions on title may be added. Supposing the abstract of title starts with a general devise of a married woman, A, leaving all her freehold land to her son X, and then goes on to state that she died at some date before January 1, 1883, the purchaser's legal adviser should enquire whether A's husband was dead when A made her will, or, if he were still living at that date, whether A owned the land for her separate use, because the Married Women's Property Act, 1882, would clearly not apply to such property. He should also call for proof that A owned the land now being sold at the date of her death. If an abstract of title shows that the land belonged to B in tail, and that B died and his eldest son, C, succeeded to the property, the purchaser would require proof that B did not bar the entail. (This can be proved by a search for disentailing deeds in the Central Office of the High Court.) By the Conveyancing Act, 1881 (*y*), it is enacted that the purchaser of any property shall not require the production of any document dated before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser, nor shall he make any requisition with respect to any such document or the title prior to that time. But this enactment is not a qualification of the main rule that

(*x*) Wms. V. & P. 1313.
(*y*) 44 & 45 Vict. c. 41, s. 3, sub-s. 3.

the vendor must show a good title. If, therefore, the title shows, or the purchaser from other sources discovers, a defect such as an incumbrance or restrictive covenant irremovable without the consent of other persons, the purchaser is not precluded from objecting to the title although the incumbrance was created before the time fixed for the commencement of the title (*z*). Moreover, this section of the Conveyancing Act, 1881, does not enable the vendor to produce a deed exercising a power of appointment as his root of title and enforce specific performance against the purchaser, unless he states clearly and fairly in the contract of sale that the abstract shall commence with such a deed. The Conveyancing Act, 1881, s. 3, sub-s. 3, does not preclude the purchaser from investigating the earlier title in other sources than the vendor unless there is an express stipulation in the contract that such an inquiry by the purchaser is precluded. If the purchaser makes such investigation and discovers a defect in the title known to the vendor at the date of the contract, the purchaser can resist specific performance. But it appears that a purchaser could not recover his deposit if a good title were shown by the abstract for the time for which title was agreed to be shown, and there were no active misrepresentation on the vendor's part. If the objection arising out of the earlier title were unknown to the vendor when he sold, it is possible that the Conveyancing Act, 1881, s. 3, sub-s. 3, would preclude the purchaser from resisting specific performance if he discovered the objection elsewhere (*a*).

Voluntary settlement.

Under 13 Eliz. c. 5, a conveyance made with intent to defeat creditors is void; and a voluntary conveyance will be presumed to be made with intent to defeat creditors if its effect is to deprive the settlor of the means of paying his debts (*b*). A voluntary settlement can be upset by the settlor's trustee in bankruptcy, under section 42 of the

(*z*) *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q. B. D. 261; Wms. V. & P. 193-5.
(*a*) Wms. V. & P. 201.
(*b*) *Freeman* v. *Pope*, L. R. 5 Ch. App. 538.

Bankruptcy Act, 1914 (*c*). But if a voluntary settlement is found on the title, the purchaser cannot refuse to complete, as it has been held that he would acquire a good title if he buys without notice that the settlor has committed an act of bankruptcy (*d*).

Courts (Emergency Powers) Acts and Increase of Rent and Mortgage Interest (Restrictions) Acts.

If the abstract shows that the land was sold by a mortgagee under his power of sale since the Courts (Emergency Powers) Acts (1914-7), and the Increase of Rent and Mortgage Interest (Restrictions) Acts (1915-20) came into force (*e*), the purchaser, unless precluded from doing so by the conditions of sale, should put requisitions as to whether the provisions of those Acts apply, and have been observed.

Condition requiring assumption of proof.

A condition of sale requiring the purchaser to assume without proof the truth of some fact stated is not binding, as regards the specific performance of the contract, if the vendor knows the statement to be untrue (*f*).

Constructive notice.

If the purchaser buys under conditions limiting his right to inquire into the vendor's title, he will, nevertheless, be bound by legal estates or rights affecting the property adverse to the vendor's interest; but with regard to equitable estates or interests adverse to the vendor's title, the purchaser is not bound by them if he obtained the legal estate from the vendor without actual or constructive notice of such estates or interests. But it must be remembered that, as stated above (*g*), if a purchaser buys under conditions limiting his right to investigate the title, he is held to have constructive notice of all equitable incumbrances (such as restrictive covenants), which he would have discovered if he had inquired into the vendor's title for the period during which the title is required to be shown by law, for a purchaser cannot avoid the consequences of receiving actual or

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(*c*) 2 & 3 Geo. 5, c. 59

(*d*) *Halifax Joint Stock Banking Co.* v. *Gledhill* [1891], 1 Ch. 31; *Re Carter and Kenderdine's Contract* [1897] 1 Ch. 776; *Re Hart, Ex parte Green* [1912] 3 K. B. 6; *Pearce* v. *Bulteel* [1916] 2 Ch. 544.

(*e*) See Chapters IV. and V. below.

(*f*) Wms. V. & P. 211.

(*g*) p. 31.

constructive notice of equitable incumbrances by contracting not to investigate the title (*h*).

Re Ford and Hill.

If the purchaser puts a general inquiry as to whether there are any charges or deeds affecting the property sold, known to the vendor or his solicitor, and not disclosed by the abstract, the vendor is not bound to answer such requisition (*i*).

Waiver of objections or requisitions.

A purchaser may waive any objection or requisition which he has made. Such waiver may be express or implied. An acceptance of the title shown by the abstract is not a waiver of the right to require the verification of the abstract (*j*) or of any objection not disclosed by the abstract. A waiver may be implied from the fact that the purchaser has taken possession, otherwise than under an express provision in the contract, after an abstract of title has been delivered, but before completion of the contract. This is *prima facie* a waiver of all objections to title appearing on the face of the abstract. Waiver may also be implied from long delay in raising objections (*k*). It has already been stated that the conditions of sale generally fix a period within which the requisitions must be sent in and provide that the vendor shall have the right to rescind the contract if he is unable or unwilling to answer a requisition.

Vendor and purchaser summons.

The Vendor and Purchaser Act, 1874 (*l*), provides that if any dispute arises in respect of any of the requisitions or objections, or any claim for compensation, or upon any other question arising out of or connected with the contract, *not being a question affecting the validity or existence of the contract*, either party can apply to a Judge in Chambers in the Chancery Division, and the Judge may make such order as to him shall appear just, and direct how and by whom the costs of the application shall be borne.

(*h*) Wms. V. & P. 212; *Re Cox and Neve's Contract* [1891] 2 Ch. 109; *Re Nisbet and Pott's Contract* [1906] 1 Ch. 386; *Perham* v. *Kempster* [1907] 1 Ch. 373.

(*i*) *Re Ford and Hill*, 10 Ch. D. 365.

(*j*) *Southby* v. *Hutt*, 2 Rly. & Cr. 207.

(*k*) Wms. V. & P. 189-90.

(*l*) 37 & 38 Vict. c. 78, s. 9.

Completion of the Contract.

If, when the investigation of title is concluded, the vendor has shown a good title according to the contract, the purchaser is bound to accept the title and complete the contract accordingly. Under an open contract the time for completion is when the vendor has shown a good title, but it is usual in formal contracts for the sale of land to fix a date for completion (*m*). If this is done, time is not, as a rule, of the essence of the contract (*i.e.*, neither party can rescind the contract because not completed at the date fixed), except that, as a rule, time will be considered to be of the essence of the contract in the following cases: (1) if there is an express provision in the contract that time shall be of the essence of the contract; (2) on sale of mining leases or short leaseholds; (3) on sale of a public house, mill or manufactory as a going concern; (4) on sale of a house for the purpose of residence. Where time is not originally of the essence of the contract, it may be made so, in the case of unreasonable delay by either party, by a notice served on him by the other party requiring him to do the act, which he has so delayed to perform, within a specified time; provided that the time so specified is reasonably sufficient for the purpose (*n*).

Completion of the contract on the part of the vendor consists in conveying with a good title the estate contracted for in the land sold, and delivering up the actual possession or enjoyment thereof; on the purchaser's part it lies in accepting such title, preparing and tendering a conveyance for the vendor's execution, accepting such conveyance, taking possession and paying the price (*o*). The purchaser's acceptance of the title is not a formal act or notice; it takes place when the vendor's last answer to the purchaser's last requisition is received without objection (*p*). But this acceptance is merely an acceptance of the title put forward by the vendor, and does not preclude the purchaser from

(*m*) Wms. V. & P. 575. (*n*) Wms. V. & P. 576-8.
(*o*) Wms. V. & P. 578.
(*p*) *Re Highett and Bird's Contract* [1902] 2 Ch. 214.

raising objections to the title on account of defects subsequently discovered from other sources, as from searches made by the purchaser.

Searches.

It is part of the proper investigation of every title to search for registered incumbrances. The following may be mentioned as examples of searches which are usually made on the purchase of land: (1) In the office of the Land Registry for writs and orders issued for the purpose of enforcing judgments. Judgments are not a charge on land until the writ or order to enforce them is registered; and it must be re-registered every five years (*q*). The search therefore should be made for five years back. (2) In the same office for any *lis pendens* (pending action regarding the land) registered or re-registered within the last five years. (3) In the same office for registered life annuities and land charges. An official search can be obtained in cases (1), (2) and (3). (4) On purchase of land situate in Middlesex or Yorkshire, a search in the county registers for any registered assurance affecting the land. (5) For registration of title in a district where registration of title is compulsory. (6) Searches for disentailing assurances or certificates of acknowledgment of deeds by married women may sometimes be necessary. (7) On purchase of copyholds, a search in the Court Rolls for any enrolled assurance affecting the land purchased.

Preparation of the conveyance.

After having examined the abstract of title with the deeds, and obtained satisfactory replies to his requisitions, the purchaser or his solicitor prepares a draft conveyance and submits it to the vendor or his solicitor for his approval. What persons are necessary parties to the conveyance will have been ascertained on the investigation of title. Every person in whom is vested any portion of the legal and equitable estate contracted for in the land sold, or any interest therein, must concur in the conveyance to the purchaser, unless his interest be such that it will be conveyed

(*q*) Land Charges Act, 1900, 63 & 64 Vict. c. 26.

or defeated by the execution of some paramount trust or power intended to be exercised by the instrument of conveyance (*r*). Thus if a fee-simple is sold free from all incumbrances, all mortgagees and portioners, all persons entitled to any term of years, rent-charge, profit *à prendre*, or easement, and all persons interested in the property sold under any trust of which the purchaser has notice are, as a rule, necessary parties to the conveyance. But if a tenant for life is selling the fee-simple under the statutory power conferred on him by the Settled Land Act, 1882 (*s*), he can convey the land discharged from all the limitations of the settlement and all estates, interests and charges subsisting thereunder, but subject to (i) all estates, interests and charges having priority to the settlement; and (ii) charges created for money actually raised at the date of the deed; and (iii) all leases, easements, rights of common, or other rights and privileges granted or made for value in money or money's worth, or agreed so to be before the date of the deed by the tenant for life, or any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life. But it has been held that (ii) does not include a mortgage by a tenant for life or a remainderman of his own interest only (*t*). Hence if A, a tenant in fee-simple, mortgaged the fee-simple to B, by legal mortgage; and then A settled his equity of redemption on X for life, with remainder to Y; and X mortgaged his life interest to Z; and X enters into a contract to sell the fee-simple to W; W cannot require Z to concur in the conveyance, although W's consent to the sale must be obtained (*u*). It would not be necessary for Y either to concur in or consent to the sale by X, but the concurrence of B, the legal mortgagee, is necessary in order that the complete fee-simple shall be transferred to the purchaser W.

(*r*) Wms. V. & P. 612—3.
(*s*) 45 & 46 Vict. c. 38.
(*t*) *Re Dickin and Kelsall's Contract* [1908] 1 Ch. 213; *Re Davies and Kent* [1910] 2 Ch. 35.
(*u*) 45 & 46 Vict. c. 38, s. 50.

Under the Conveyancing Acts, 1881 and 1911 (*v*), upon the sale of any land subject to any incumbrance (including any mortgage, lien or charge, of the portion or annuity or other capital or annual sum, whether immediately payable or not) the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court of a sum of money sufficient to provide for the amount charged on the land and future costs, expenses and interest; and the Court may then declare the land to be freed from the incumbrance. This enables the vendor to procure land, which is subject to mortgages or charges, to be conveyed to the purchaser for an unincumbered estate without the concurrence of the incumbrancers.

Discharge of incumbrances on sale by payment into Court.

If the legal estate is outstanding in mortgagees or trustees, and it is to be conveyed to the purchaser, the latter should take care that it is conveyed to him direct by the mortgagees or trustees. Thus A mortgages his land to B, by legal mortgage, and afterwards agrees to sell the land to C, and the legal mortgage is to be paid off out of the purchase money. B should be made a party to the conveyance to C, and should convey the legal estate direct to C. C will thus become a purchaser of the legal estate for value and be free from any intermediate equitable mortgages, if any, which the vendor may have created, but of which the purchaser has no notice. Otherwise the risk may occur that the vendor, while he was entitled to the equitable estate in the lands, may have executed a conveyance by way of mortgage containing a recital that he was seised in fee-simple of the land, in which case he and all persons claiming under him would be estopped from denying that he was so seised. Therefore if the purchaser, instead of having the legal estate conveyed to him direct by the legal mortgagee, allows the vendor to take a reconveyance from the legal mortgagee before completing the purchase, and then to convey the land to the purchaser, the purchaser, claiming by a subsequent conveyance from the vendor, would be subject to the same

Conveyance of outstanding legal estate.

(*v*) 44 & 45 Vict. c. 41, s. 5; 1 & 2 Geo. 5, c. 37, s. 1; *Re Wilberforce* [1915] 1 Ch. 94.

estoppel, and would be precluded from alleging that the intermediate conveyance passed an equitable estate only, and that he himself held the legal estate as a purchaser for value without notice of such mesne conveyance (*w*).

Costs of the sale.

As a rule each party pays his own solicitor's costs. But although the vendor must pay the cost of making an abstract, including the cost of producing documents not in his own possession if such documents are required for the making of the abstract, the purchaser is bound, if there is no stipulation to the contrary, to pay the cost of searching for or procuring or producing all evidence of title which is not in the vendor's possession. The purchaser, generally, pays the cost of preparing the conveyance, but the vendor must pay the cost of his own execution of the conveyance. If it is necessary to obtain the joinder of other parties, *e.g.*, where the legal estate is outstanding in a mortgagee, who has been paid off, but who has not yet reconveyed, the vendor must, in the absence of any stipulation to the contrary, pay the expense of the concurrence of such other necessary parties. If the vendor is a tenant in tail selling the fee-simple, and the estate tail is not barred before completion, the vendor must bear the cost of the enrolment of the conveyance, for (unless he is selling under the Settled Land Acts 1882-90), he has no power to convey the fee-simple without barring the entail (*x*).

Stamps on conveyance.

The deed of conveyance must be duly stamped according to the *ad valorem* duty charged on conveyances by the Stamp Act, 1891 (*y*), as amended by the Finance (1909-10) Act, 1910 (*z*).

Execution of the conveyance.

The actual completion of the sale usually takes place at the office of the vendor's solicitors; and the conveyance is either executed there and then, or else, having been previously executed by the vendor and all other necessary parties, if any, it is handed over to the purchaser in exchange

(*w*) Wms. V. & P. 622-3.
(*x*) Wms. V. & P. 733-4.
(*y*) 54 & 55 Vict. c. 39.
(*z*) 10 Ed. 7, c. 8.

for payment by him of the amount due for the price. At the same time all the title deeds and other documents of title, which were in the vendor's possession and which he has no claim to retain, are delivered over to the purchaser. The purchaser must take care that he pays the purchase money to such person or persons only as are entitled to receive the same and can give a good discharge therefor (*a*). The purchaser is not entitled to require that the conveyance to him be executed in his presence or in that of his solicitor as such, but is entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor (*b*). Formerly the purchaser's solicitor inspected the deed to see that it was duly stamped with one of the increment value duty stamps mentioned in the Finance (1909-10) Act, 1910 (*c*); but by the Finance Act, 1920 (*cc*) this duty was repealed. Where the purchaser has notice of any incumbrance on the property sold, he must take care that the amount due to the incumbrancers is paid to them direct, and the surplus, if any, of the purchase money, he should pay to the vendor. If the conveying party's solicitor produces a deed containing a receipt clause (*d*), the deed is sufficient authority for the purchaser to pay the money to the solicitor (*e*); even if the vendors are trustees (*f*). The vendor is only bound to accept banknotes or coins; he may object to take a cheque or any other negotiable security; and where a solicitor is authorised to receive purchase money, he is not at liberty to accept payment otherwise than in cash or notes without express authority from his client (*g*). But in practice it is generally arranged beforehand that payment shall be by means of bankers' drafts, to avoid the risk of carrying about banknotes of large amount (*h*).

(*a*) Wms. V. & P. 737.
(*b*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 8.
(*c*) 10 Edw. 7, c. 8. (*cc*) 10 & 11 Geo. 5, c. 18, s. 57.
(*d*) See later, p. 102.
(*e*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 56.
(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17.
(*g*) *Papé* v. *Westacott* [1894] 1 Q. B. 272.
(*h*) Wms. V. & P. 745.

Capacity of the Parties and Power to Convey.

To constitute a valid contract, all parties to the agreement must have full capacity to contract, and in sales of land it is also necessary that the vendor shall have full legal capacity and power to dispose of the land and the purchaser to accept a conveyance thereof. Moreover, upon the investigation of title to any land sold, it is the duty of the purchaser's adviser to consider the capacity and power of all persons who have made any assurance, forming part of the title, to dispose of the land (*i*).

Persons who are under some personal disability in regard to the purchasing, holding, and disposing of land include infants, persons of unsound mind, married women, convicts, and corporations. Persons who, though suffering under no personal disability, may not have complete power to dispose of land include executors and administrators, trustees, persons selling under a power of appointment, tenants for life, mortgagees.

Infants.

At common law a conveyance by an infant is not void, but he can repudiate it either before, or within a reasonable time after, he comes of age; and his representatives may avoid it if he die under age. An exception occurs in the case of gavelkind lands, which may be conveyed by an infant at fifteen years of age or upwards by a feoffment. The feoffment need not be evidenced by deed; but it must be put into writing and signed by the infant in order to satisfy the Statute of Frauds (*j*); and livery of seisin must be made by the infant in person. Where on the face of a feoffment on a sale by a dowress and coheirs in gavelkind, of whom one was an infant, it appeared that the infant had not received full value for his share, it was held that the feoffment was not binding on him (*k*). An infant may also convey real estate under a power purely collateral (*i.e.*, a power which may be

(*i*) Wms. V. & P. 869—70.
(*j*) 29 Car. 2, c. 3, s. 1.
(*k*) *Re Maskell and Goldfinch's Contract* [1895] 2 Ch. 525.

possessed by a person over property in which he has no interest), and a power collateral or power in gross over personal property, if exerciseable by deed (*l*). He cannot exercise any power by will, unless he is a soldier on actual military service, or a mariner or seaman at sea (*m*). There are also certain statutory exceptions to the common law rule. Thus by the Infants' Settlements Act, 1855 (*n*), every infant not under twenty if a male, and not under seventeen if a female, can, with the leave of the Court, make a binding settlement on marriage. Moreover the land of an infant can be sold on his behalf under the Settled Estates Act, 1877 (*o*) (the Conveyancing Act, 1881 (*p*), providing that where an infant is, in his own right, seised or entitled to land in fee-simple, or for any leasehold interest at a rent, the land is to be deemed a settled estate), and under the Settled Land Act, 1882 (*pp*). Under the Settled Land Act, 1882, if an infant is in his own right seised in fee-simple of land, or entitled in possession for any estate or interest, or if he is a tenant for life at law or in equity, the powers of a tenant for life under that Act (which include powers of selling the fee-simple and of granting leases) may be exercised on his behalf by the trustees of the settlement, if any, or if there be none, then by such person and in such manner as the Court, on the application of the infant's guardian or next friend, may order. Various statutes, also, have made provision for the sale of the lands of infants by their guardians, *e.g.*, when the land is required for public purposes (*q*).

If an infant enters into a contract to buy land, he can repudiate the contract and can, probably, recover the deposit (*r*). If the other party, being of full age, refuses to carry out the contract, the infant can sue him for damages,

(*l*) *Re D'Angibau*, 15 Ch. D. 228.
(*m*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 7; Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58).
(*n*) 18 & 19 Vict. c. 43.
(*o*) 40 & 41 Vict. c. 18.
(*p*) 44 & 45 Vict. c. 41, s. 41.
(*pp*) 45 & 46 Vict. c. 38, ss. 59, 60.
(*q*) Land Clauses Act, 1845 (8 & 9 Vict. c. 18).
(*r*) Wms. V. & P. 886.

but cannot enforce specific performance, for, as it could not be specifically enforced against the infant, the remedy would not be mutual. If the contract is completed by conveyance to the infant, the latter may, on attaining full age or within a reasonable time afterwards, disclaim the estate, and so escape any liability incident thereto, as the liability for the rent and covenants, if the land bought were leasehold. But it is doubtful whether he can in any case recover the price paid (*s*).

Persons of unsound mind.

Dispositions of property made by a person of unsound mind, but not so found by inquisition, are void if gratuitous. If made for valuable consideration with some person who was aware of his insanity, the disposition is voidable. If made for valuable consideration with some person who was not aware of his insanity, it is valid (*t*). If a person has been found lunatic by inquisition, any disposition of property by deed made by him after the inquisition is absolutely void. Under the Lunacy Act, 1890 (*u*), if a person has been found lunatic by inquisition, his committee can sell or otherwise deal with his property, subject to the directions of the judge in lunacy; and by section 116 of the Act, in the case of certain lunatics not so found, these powers can be exercised by such person as the Court may direct. The committee of a lunatic so found can, with leave of the judge in lunacy, exercise on behalf of the lunatic the powers given to limited owners by the Settled Land Acts, 1882-90 (*v*). If was held that these powers could not be exercised in the case of a lunatic not so found (*w*). But by the Lunacy Act, 1908 (*x*), in the case of any of the persons mentioned in sub-section (1) of section 116 of the Lunacy Act, 1890, not being a lunatic so found by inquisition, any powers which, if such person were a lunatic so found by inquisition, could be exercised by his committee, may be exercised by such person in such manner as the judge in lunacy or, subject to the rules in lunacy, a master may direct.

(*s*) Wms. V. & P. 884—5.
(*t*) Wms. V. & P. 88
(*u*) 53 Vict. c. 5.
(*v*) 45 & 46 Vict. c. 38.
(*w*) *Re Martha Baggs* [1894] 2 Ch. 416.
(*x*) 8 Edw. 7, c. 47.

A purchase of property by a lunatic is binding unless his insanity be known to the vendor (*y*).

Married women.

If a woman was married before January 1, 1883, and her title to freehold land accrued before that date, she cannot convey such land, either the legal or equitable estate, except by deed acknowledged in which her husband joins, unless such property has been settled upon her "for her separate use" (*z*). The Court can dispense with the husband's concurrence when he is of unsound mind, or if his residence is not known, or he is in prison, or living apart from his wife (*a*). If the land has been settled upon her for her separate use, she can convey the equitable estate therein as a *feme sole;* but if the land so settled was not vested in trustees, but was limited to the wife directly for her separate use, she cannot convey the legal estate except by deed acknowledged in which her husband joins. If, however, she has been given a power of appointment over land, she can exercise it without her husband's concurrence and without any special formalities. If the land is a legal interest in copyhold, it must be conveyed by a surrender by the married woman and her husband, the wife being separately examined as to her consent by the steward of the manor. If the land is leasehold, and it does not belong to her for separate use, the husband can dispose of such leaseholds during his lifetime, and the wife has no power over it. If the husband does not dispose of it during his lifetime, it will pass to his wife if she survive him. If the leaseholds belong to her for her separate use, she can dispose of them as a *feme sole*.

If the woman was married after 1882, or if she acquired her title to the land since that date, she can, by virtue of the Married Women's Property Act, 1882, convey her freehold or leasehold property by an ordinary deed as a *feme sole* and her

(*y*) *Molton* v. *Camroux*, 2 Ex. 487.
(*z*) Fines and Recoveries Act, 1883 (3 & 4 Will. 4, c. 74); Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).
(*a*) Fines and Recoveries Act, 1833 (3 & 4 Will 4, c. 74), s. 91.

legal copyholds by surrender. It should be noted that an interest to which a married woman was entitled before 1883, either contingently or in reversion or remainder, is not separate property under the Act, even though it falls into possession after 1882 (*b*).

Notwithstanding the Married Women's Property Act, 1882, a married woman who was a trustee of land could not convey such land, except by deed acknowledged in which her husband joined, save where she was merely "a bare trustee," *i.e.*, with no duties to perform except to convey the land by the direction of the *cestuis que trust* (*c*). But now, by the Married Women's Property Act, 1907 (*d*), a married woman can dispose of any property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*. This enactment is retrospective and makes valid all such dispositions since 1882, except where a title has been acquired with the concurrence of the husband before 1908. Thus A, a married woman, is a trustee of land with a power to sell. In 1893 she conveys the land to C, by ordinary deed. In 1894 she and her husband join together, and A, by deed acknowledged, conveys the same land to D. The title of D prevails over that of C.

It would appear that if a married woman wishes to disclaim an interest in land of any tenure, a deed acknowledged may still be necessary.

If land has been settled on a married woman with "restraint on anticipation," she cannot, even since the Married Women's Property Act, 1882, dispose of such land, unless the Court permits alienation under section 7 of the Conveyancing Act, 1911 (superseding section 39 of the Conveyancing Act, 1881), where it appears to be for her

(*b*) *Reid* v. *Reid*, 31 Ch. D. 402.
(*c*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 16; *Re Harkness and Allsopp's Contract* [1896] 2 Ch. 358.
(*d*) 7 Edw. 7, c 18, s. 1.

benefit (*e*); or unless she is a tenant for life of such land under the Settled Land Acts, 1880-90, in which case she can exercise all the powers of a tenant for life under those Acts, including the power of alienating the fee-simple, in spite of the restraint (*f*). If she sells under the Settled Land Acts, the restraint on anticipation would apply to her life interest in the purchase money. It has been decided that a restraint on anticipation does not prevent a married woman from disclaiming property (*g*), and that, as the restraint is only effectual during coverture, if property has been given to trustees on trust for an unmarried woman without power of anticipation, she can prevent the restraint from attaching by assigning the property before marriage. It is sufficient assignment for her to execute a deed poll, communicated to the trustees before she marries, declaring that the trustees shall hold the property for such purposes as she shall appoint (*h*). At common law, if a married woman purchased land, the purchase might be avoided by her husband, who might effectually disagree thereto, or by herself after the determination of the coverture, and notwithstanding that her husband had agreed thereto, or by her representatives if she died without having agreed thereto, when free from coverture (*i*). Since the Married Women's Property Act, 1882, a married woman may acquire property like a *feme sole*.

It may be added that, under the Divorce Acts of 1857 and 1858, and the Summary Jurisdiction (Married Women) Act, 1895, a married woman who has obtained a judicial separation or a protection order, or an order in the nature of a judicial separation, shall, whilst the separation shall continue, be considered as a *feme sole* in regard to any property which may devolve on or be acquired by her during the separation (*j*).

(*e*) 44 & 45 Vict. c. 41, s. 39; 1 & 2 Geo. 5, c. 37, s. 7.
(*f*) 45 & 46 Vict. c. 38, s. 61.
(*g*) *Re Wimperis* [1914] 1 Ch. 502.
(*h*) *Re Chrimes* [1917] 1 Ch. 30.
(*i*) Wms. V. & P. 902.
(*j*) 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; 58 & 59 Vict. c. 39.

Convicts.

Convicts, or persons against whom judgment of death or penal servitude has been pronounced or recorded for treason or felony, are not under any incapacity to purchase land. Since the Forfeiture Act, 1870 (*k*), which abolished forfeiture of land upon judgment for treason or felony, convicts may hold land; but the Act provides that convicts cannot alienate property or make any contract, while subject to the operation of the Act. An administrator of the convict's property may be appointed by the Crown, and the property of the convict vests in such administrator. The administrator can let, mortgage, sell, convey and transfer any part of such property (*l*). The administrator has no power to bar an estate tail belonging to the convict, but the convict himself can do so (*m*).

Corporations.

A common law corporation has as full capacity to purchase, hold and dispose of lands as any natural person who is free from disability (*n*). But under the Mortmain and Charitable Uses Act, 1888 (*o*), Part 1, the assurance of land to or for the benefit of a corporation in mortmain, otherwise than under the authority of a royal licence or a statute, is a cause of forfeiture to the lord of the fee; or if he fail to enter within a year, to his superior lord; and in default of entry thereon by any mesne lord, to the Crown. Many corporations are empowered by statute to hold land without a licence in mortmain, some without any restriction, others to an amount not exceeding a certain annual value. In other cases the alienation of land, or of a limited quantity of land, into mortmain is permitted for particular purposes, which are charitable or for the public use or benefit (*p*). Companies registered under the Companies (Consolidation) Act, 1908 (*q*) may hold land; except that a company formed for the purpose of promoting art, science, religion or any other like object, not involving the acquisition of gain, shall not,

(*k*) 33 & 34 Vict. c. 23.
(*l*) Wms. V. & P. 896.
(*m*) *Re Gaskell and Walters' Contract* [1906] 2 Ch. 1.
(*n*) Wms. V. & P. 943.
(*o*) 51 & 52 Vict. c. 42.
(*p*) Wms. V. & P. 944—5.
(*q*) 8 Edw. 7, c. 69.

without the sanction of the Board of Trade, hold more than two acres of land.

A corporation existing as such at common law has as full capacity to dispose of its lands as a natural person free from disability. But corporations existing for public or charitable purposes have in many instances been restrained by statute from disposing freely of their lands. Thus municipal corporations cannot sell corporate lands without the consent of the Ministry of Health (*r*), and the alienation of the estates of ecclesiastical corporations and colleges is now regulated by many statutes. By the Land Clauses Consolidation Act, 1845 (*s*), which deals with the compulsory taking of land for undertakings of a public nature, if a corporation, such as a railway company, has acquired superfluous lands (*i.e.*, land over and above what is required for the purpose of the undertaking), such lands must be sold within the time prescribed by the special Act, or, if no period be prescribed, within ten years after the time limited for completion of the undertaking. Such superfluous lands, unless situate in a town or built upon, or used for building purposes, are to be offered, first, to the person then entitled to the lands from which the same were originally severed, and if such person refuses to buy or cannot be found, then to the adjoining owner or owners. The right of pre-emption must be exercised within six weeks of the offer, and, if the price cannot be agreed on, it is to be fixed by arbitration. If the adjoining landowners decline to buy, the lands may be sold to any person; but if such lands are not sold by the expiration of the ten years, they become vested in the owners of the property adjoining thereto in proportion to the extent of their lands respectively adjoining the same.

Conveyances of land to charities are for the most part governed by Part II. of the Mortmain and Charitable Uses Charities.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50); Local Government Act, 1888 (51 & 52 Vict. c. 41); Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21).

(*s*) 8 & 9 Vict. c. 18.

Act, 1888 (*t*), which the student will have read in his study of the general principles of real property, and to which, therefore, no further reference is here made. As to dispositions of lands by charities, the Charitable Trusts Act, 1855 (*u*), provides that it shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Charity Commissioners, any sale, mortgage or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years. Even if the instrument creating the charitable trust confers on the trustees an express power to sell trust land, such power cannot be exercised except in accordance with the restrictions of the Act of 1855 (*v*). But many charities (including any charity wholly maintained by voluntary contributions) are exempted by statute from these provisions (*w*).

Executors and administrators.

Executors or administrators of a person who died after 1897 can sell his freehold land (legal or equitable estate), and his equitable estate in copyholds under the Land Transfer Act, 1897 (*x*), for the payment of his debts and to meet the costs of the administration of his estate. If the land is in the possession of the executors or administrators, the purchaser may assume that there are unpaid debts. When the land has been actually transferred to the devisee or heir, the power of sale of the executor or administrator comes to an end. Under the Act of 1897 it was necessary for all the executors who had not renounced probate to join in the conveyance to the purchaser (*y*); but by the

(*t*) 51 & 52 Vict. c. 42. (*u*) 18 & 19 Vict. c. 124.
(*v*) *A.-G.* v. *Mathieson* [1907] 2 Ch. 383.
(*w*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137); Charitable Trusts Act, 1894 (57 & 58 Vict. c. 35).
(*x*) 60 & 61 Vict. c. 65.
(*y*) *Re Pawley and the London and Provincial Bank* [1900] 1 Ch. 58.

Conveyancing Act, 1911 (*z*), it is sufficient if the land is conveyed by those executors who have proved the will. This enactment applies to all probates whenever granted, but only to dispositions made after 1911. If a purchaser has bought land from an executor or administrator, he has a good title, if he has acted *bonâ fide*, even though the grant of probate or administration is subsequently revoked (*a*).

If a person died before January 1, 1898, his administrators had no power to sell his freehold or copyhold land if he was the beneficial owner thereof, but his executors could do so (1) if the will gave them an express power to sell; or (2) if the testator by his will charged his real estate with the payment of his debts or legacies and did not devise the land so charged to a trustee or trustees for his whole interest therein (*b*). It has been held that when executors sell real estate charged with debts under the power of sale so given by statute, the purchaser is not bound to inquire whether any debts remain unpaid, until twenty years have elapsed after the testator's death; but after that time a presumption would arise that the debts had been paid and the purchaser cannot safely complete without inquiry (*c*). As stated above, this time limit does not apply to a sale by an executor or administrator under the Land Transfer Act, 1897.

Leaseholds vest in the executors or administrators apart from statute. They can sell leaseholds unless the leaseholds have been actually transferred to the legatee or next-of-kin, and the purchaser is entitled, unless he has actual notice that no debts remain unpaid, to presume that such a sale is rightly made, although more than twenty years have elapsed since the testator's or intestate's death (*d*). One of two or more executors can sell leaseholds; but if one only out of several executors enters into a contract to sell and the con-

(*z*) 1 & 2 Geo. 5, c. 37, s. 12
(*a*) *Hewson* v. *Shelley* [1914] 2 Ch. 813.
(*b*) 21 & 22 Vict. c. 35.
(*c*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.
(*d*) *Re Verrell's Contract* [1903] 1 Ch. 65.

tract is not carried out, the Court may refuse specific performance. The legal estate in copyhold does not pass to the executors or administrators under the Land Transfer Act, 1897.

If a mortgagee of leaseholds dies, the leaseholds vest in his executors or administrators, who can exercise the mortgagee's power of sale. If a mortgagee of freeholds dies, the freeholds vest in his personal representatives by virtue of the Conveyancing Act, 1881 (*e*), and they can exercise the mortgagee's power of sale. If there are several personal representatives, they need not all join in the sale. But in the case of a mortgage of copyholds, where the mortgagee has been admitted as tenant on the Court rolls, the Copyhold Act, 1887 (*f*), now replaced in this respect by the Copyhold Act, 1894 (*g*), provided that the provisions of the Conveyancing Act, 1881, should not apply. On the death of a mortgagee of copyholds, who has not been admitted tenant on the rolls, it appears that his estate will still devolve on his executors or administrators.

In regard to land held by a person as a trustee, the Conveyancing Act, 1881 (*h*), and the Conveyancing Act, 1911 (*i*), provide that where a power or trust, created after 1881, is given to two or more trustees jointly, then, unless the contrary is expressed in the instrument creating the trust, the same may be exercised or performed by the survivors or survivor, and, until the appointment of new trustees, by the personal representatives or representative of the last survivor. But this provision does not apply to land of copyhold or customary tenure vested in the tenant on the Court rolls on trust.

Trustees.

Trustees cannot, as a rule, sell land they hold as trustees, unless they have been given a power to sell by the trust instrument or unless the persons who are in equity

(*e*) 44 & 45 Vict. c. 41, s. 30.
(*f*) 50 & 51 Vict. c. 73, s. 46.
(*g*) 57 & 58 Vict. c. 46, s. 88.
(*h*) 44 & 45 Vict. c. 41, s. 38.
(*i*) 1 & 2 Geo. 5, c. 37, s. 8.

beneficially entitled to the land are all *sui juris*, and all desire a sale. If they are trustees under a settlement within the meaning of the Settled Land Act, 1882, they cannot exercise an express power to sell without the consent of the tenant for life entitled in possession under the settlement (*j*). Should, however, the settlement settle the land on trustees with an express trust to sell, the trustees can sell without the consent of the tenant for life (unless such consent is expressly required by the terms of the settlement) (*k*). A power must not be accelerated, and, therefore, if trustees have a power to sell on the death of the tenant for life, they cannot, even with his consent, sell in his lifetime (*l*).

A difficulty formerly attending a sale by trustees under a trust for sale was that of satisfying the purchaser that the trust was still continuing. This has been removed by the Conveyancing Act, 1911, which provides (*m*) that a trust for sale of land, so far as regards the safety and protection of any purchaser thereunder, is to be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale.

In certain cases trustees have statutory power to sell land, *e.g.* (1) if land is devised to trustees charged with the payment of the debts of the testator (*n*); (2) if a tenant for life, or a person having the powers of a tenant for life under the Settled Land Act, 1882, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under the Act, the powers of a tenant for life under the Act may be exercised on his behalf by the trustees of the settlement (*o*); (3) if property, vested in trustees by way of security, becomes, by virtue of the statutes of limitation, or of an order for foreclosure or otherwise, discharged from the right of redemption, the trustees,

(*j*) 45 & 46 Vict. c. 38, s. 56.
(*k*) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 63.
(*l*) *Want* v *Stallibrass*, L. R. 8, Ex. 175.
(*m*) 1 & 2 Geo. 5, c. 37, s. 10 (3). Elph. Conv. 172.
(*n*) 22 & 23 Vict. c. 35.
(*o*) 45 & 46 Vict. c. 38, s. 60.

by the Conveyancing Act, 1911, are to hold the property on trust for sale, with power to postpone the sale for such a period as they may think proper (*p*); (4) if a settlement of personalty is made after 1911, and contains a power to invest money in the purchase of land, a trust for sale of land purchased under the power, with power to postpone the sale, is implied by virtue of the Conveyancing Act, 1911, section 10, unless the settlement otherwise provides (*q*).

Under the Trustee Act, 1893 (*r*), where a trust for sale or a power of sale is vested in a trustee by any instrument coming into operation after the year 1881, and in the absence of any expression of a contrary intention, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matters as the trustee thinks fit, without being answerable for any loss. But, notwithstanding this section, if a trustee makes depreciatory conditions of sale, not strictly necessary in the state of the title, he will be liable to make good any loss thereby caused to the trust estate (*s*). It is, however, provided by the Trustee Act, 1893 (*t*) that, with regard to sales made after December 24, 1888, no sale made by a trustee shall be impeached by any beneficiary upon the ground that the conditions of sale were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate; and no sale made by a trustee shall, after the execution of the conveyance, be impeached as against a purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made; and no purchaser, upon any sale made by a trustee,

(*p*) 1 & 2 Geo. 5, c. 37, s. 9.
(*q*) 1 & 2 Geo. 5, c. 37, s. 10.
(*r*) 56 & 57 Vict. c. 53, s 13.
(*s*) Wms. V. & P. 265.
(*t*) 56 & 57 Vict. c. 53, s. 14, replacing 51 & 52 Vict. c. 59, s. 3.

shall be at liberty to make any objection to the title on this ground.

A trustee who is selling property under a trust or power of sale must not buy the property from himself or his co-trustees, unless he is expressly authorised to do so by the trust instrument, or he obtains the leave of the Court. But a trustee who has retired from the trust can purchase the trust property from the then existing trustees, if the interval since he retired is sufficiently great to show that he could not have retired in contemplation of such purchase, although, even then, the sale would probably be voidable if the ex-trustee concealed any information acquired by him as a trustee and affecting the value of the property (*u*). But a trustee may buy from his *cestui que trust* either the whole or any part of the latter's interest in the trust estate, provided that (1) he discloses every circumstance known to him that may affect the value of the property; (2) he gives a fair price; and (3) the *cestui que trust* has independent advice (*v*).

It may be added that similar restrictions exist in case of sales to those other than trustees, if they stand in a fiduciary relation to the seller, *e.g.*, sales by a client to his solicitor, by a patient to his doctor, or by a person to his religious adviser.

Keeping trusts off the title.

Whenever the purchaser's adviser obtains notice from any document or fact appearing on the abstract or elicited in the course of investigation of the title that a person entitled to some legal estate or interest in the property sold holds the same upon some trust, he must see that title is properly deduced from all persons beneficially entitled under the trust, unless the circumstances be such that a good title can be made without the concurrence of the beneficiaries, as in the case of a trust for or power of sale. When lands are vested in trustees, it is frequently desired to keep notice of

(*u*) Wms. V. & P. 987. (*v*) Wms. V. & P. 845.

the trust off the title. This is especially the case when mortgages are made to trustees; and it has been the regular practice, whenever a mortgage is held by trustees, to represent in the mortgage deed that they are jointly entitled in equity as well as at law. This was done, before 1882, by a "joint account clause" in the mortgage deed, and has since been usually accomplished by the operation of section 61 of the Conveyancing Act, 1881 (*w*), which provides that where, in a mortgage made since 1881, mortgage money is expressed to be advanced by the mortgagees out of money belonging to them on a joint account, or a mortgage after 1881 is made to the mortgagees jointly, the mortgage money is deemed to be money belonging to the mortgagees in a joint account as between them and the mortgagor; and the receipt in writing of the survivors or survivor, or the personal representatives of the last survivor, is good, notwithstanding notice to the payer of a severance of the joint account (*x*). When such a mortgage is transferred to give effect to the appointment of new trustees, recitals are framed in the deed of transfer which shall not disclose the trust. Thus if A and B are trustees who have invested trust money on mortgage, and A wishes to retire from the trust, C being appointed in his place, C is duly appointed a trustee in the usual way, and then a separate deed is executed between the three whereby, after a recital that the principal money and interest now owing upon the security have become the property of B and C, A and B assign the mortgage debt and convey the mortgaged lands to B and C. It has been held that such recitals shall be accepted by a purchaser without inquiry (*y*). Conveyancers, although well aware for what purpose such statements are made, do not seek to go behind them, and abstain from inquiries which, if answered, would oust their client from the position of a purchaser for value obtaining the legal estate in good faith without notice of any trust (*z*). If land is

(*w*) 44 & 45 Vict. c. 41, s. 61; Wms. V. & P. 238.
(*x*) Elph. Conv. 202.
(*y*) *Re Harman and Uxbridge &c., Rail Co.*, 24 Ch. D. 720.
(*z*) Wms. V. & P. 239.

settled upon trustees in trust to sell, it is advisable to draw up two deeds, the first deed conveying the land to the trustees upon trust to sell, and the second deed setting out the trusts of the proceeds of sale; the second deed or settlement is thereby prevented from becoming one of the documents of title to the land, and, when the land is sold, it need not be referred to in the abstract nor handed over to the purchaser on completion.

Powers of appointment.

Where the title depends on the exercise of a power of appointment, it is the duty of the conveyancer advising the purchaser to ascertain that the power has been or will be in all respects well executed (*a*). Under the Wills Act of 1837 (*b*) wills executing powers must be executed and attested by two witnesses. If so executed and attested, they operate as valid executions of the power, notwithstanding that the instrument creating the power may have required some additional or other form of execution or solemnity. An infant cannot exercise a power by will, unless he is a soldier on actual military service or a mariner or seaman at sea (*c*). Under Lord St. Leonards' Act (*d*), if a power of appointment is exerciseable by deed, it is well exercised, subsequently to the Act, by a deed executed in the presence of and attested by two witnesses, although the instrument creating the power may have required some additional or other form of execution or attestation or solemnity. Equity will aid the defective execution of a power, if the intended appointee be a purchaser from or the wife or a child or a creditor of the person intending to exercise the power, or if the appointment be for a charitable purpose. This relief is only afforded to cure defects which are not of the essence of the power, such as the want of a seal or proper number of witnesses, or execution by will of a power to appoint by deed. No relief will be given if a power exerciseable by will is exercised by deed (*e*).

(*a*) Wms. V. & P. 293.
(*b*) 7 Will. 4 & 1 Vict. c. 26, s. 10.
(*c*) 7 Will. 4 & 1 Vict. c. 26, ss. 7 & 11; Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58); *Re Wernher* [1918] 2 Ch. 82.
(*d*) 22 & 23 Vict. c. 35, s. 12. (*e*) Wms. V. & P. 296.

If the title depends on the valid exercise of a special power of appointment, the conveyancer must see that the appointment is made in favour of the objects of the power, or some or one of them, and that the power was not fraudulently executed. Thus if a person has a power to appoint among his children, he cannot appoint to a grandchild; and if a person, having a special power to appoint among a class, appoints to one of that class under a bargain that he shall receive some advantage in return, the appointment can be set aside as a fraud on the power. The conveyancer must also consider whether the appointment infringes the rule against perpetuities. The student will remember that, in the case of general powers of appointment, the period allowed by the rule dates from the time of the exercise of the power, whereas, in the case of special powers of appointment, the period dates from the time when the instrument creating the power comes into operation.

Tenants for life.

Tenants for life and other limited owners have a statutory power to sell the fee-simple under the Settled Land Acts, 1882 to 1890. These Acts are discussed at some length below (*f*). It is sufficient here to state that if a purchaser is buying the fee-simple from a tenant for life, the purchaser's adviser should consider: (1) Is there a settlement within the meaning of the Settled Land Acts? (2) Is the vendor entitled in possession? (3) Are there trustees within the meaning of the Settled Land Acts? (4) Is the consent of such trustees, or an order of the Court, necessary? (As, for example, where the property purchased comprises the principal mansion house on the settled land). A person dealing in good faith with the tenant for life is not concerned to inquire whether the tenant for life has given notice to the trustees of his intention to sell, and in fact it is improper to make any such inquiry; for if the purchaser ask this question and be informed of facts disclosing some irregularity, he may lose the benefit of the protection afforded to those who abstain from inquiry (*g*). There must not be

(*f*) Chapter VI.

(*g*) Wms. V. & P. 302.

less than two trustees to receive the capital money unless the settlement expresses a contrary intention (*h*). The student must remember that the abstract of title of a vendor selling as a tenant in fee-simple may show that the title depends on some sale previously made by a tenant for life, in which case the purchaser's adviser must consider the same points, referred to above, in regard to such tenant for life. Thus if the abstract of title shows that there was a settlement on A for life and that B and C were appointed trustees for the purpose of the Settled Land Acts; that B died, and that A afterwards sold the fee-simple to X, the present vendor; the purchaser's adviser should demand proof that another trustee was appointed to take the place of B before A conveyed the fee-simple to X, or proof that X, acting in good faith and supposing that there were two trustees for the purpose of the Settled Land Acts, paid the purchase money into Court at the vendor's request (*i*).

Mortgagees.

A mortgagee can sell (1) under an express power of sale, (2) by order of the Court, (3) under the implied power of sale given to mortgagees by the Conveyancing Act, 1881 (*j*), as extended by the Conveyancing Act, 1911 (*k*). This statutory or implied power of sale is conferred on mortgagees whose mortgage is by deed. As this and other matters connected with mortgages are discussed at length below (*l*), it is sufficient to point out here that where the title depends on the exercise by a mortgagee of the statutory power of sale, the Conveyancing Act, 1911, provides (*m*) that the purchaser is not, and never has been, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale or due notice has been given, or the power is otherwise properly and regularly exercised. Should the mortgagee exercise the power improperly, the mortgagor's remedy is to sue the mortgagee for damages. But if the abstract of title shows that the land was sold by a mortgagee during the period covered by the Courts

(*h*) *Re Johnson* [1913] W. N. 222.
(*i*) Wms. V. & P. 303.
(*j*) 44 & 45 Vict. c. 41, s. 19.
(*k*) 1 & 2 Geo. 5, c. 37, s. 4.
(*l*) Chapter V.
(*m*) 1 & 2 Geo. 5, c. 37, s 5.

(Emergency Powers) Acts, 1914-7, and the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1915-20, the purchaser must satisfy himself that the mortgagee was in a position to sell. These Acts are referred to below (*n*).

REMEDIES FOR BREACH OF THE CONTRACT.

Common law remedies.

If the vendor breaks the contract (*e.g.*, if he fails to show a good title or to convey the property sold), the purchaser has, at common law, the right (1) to recover the deposit he has paid, if any, and, in the absence of stipulation to the contrary, interest thereon; (2) to recover expenses incurred in investigating the title. But he has not the right to recover damages for the loss of his bargain if the vendor is prevented from carrying out his contract by a defect in the title. This exception to the common law rule regarding damages for breach of contract is due to the fact that, owing to the difficulty and uncertainty of the English law of real property, the parties to a sale of land must be considered to have contracted on the understanding that if the purchase goes off because of the vendor's inability to make a good title, the purchaser shall only be recouped his expenses and shall not recover any other damages (*o*). But if the vendor wilfully refuses or neglects to take the steps proper to prove the title, or to put the purchaser in possession, or if he will not do what he can and should do in order to make a good title, he would be liable to pay substantial damages (*p*).

If the purchaser breaks the contract, *e.g.*, fails to complete within a reasonable time or to accept a good title, the vendor cannot recover the full price as damages, but can claim only the loss he has sustained as ascertained by a resale of the land within a reasonable time. In this case the vendor must give credit for any deposit he has received in ascertaining the loss he has suffered on the resale, even if the contract

(*n*) Chapter V.

(*o*) Wms. V. & P. 1065; *Bain* v. *Fothergill* 7 H. L. 158.

(*p*) *Engel* v. *Fitch*, L.R. 4 Q. B. 659; *Day* v. *Singleton* [1899] 2 Ch. 320; *Jones* v. *Gardiner* [1902] 1 Ch. 191; *Re Daniel* [1917] 2 Ch. 405; *Braybrooks* v. *Whaley* [1919] 1 K. B. 435.

expressly provides that the deposit shall be forfeited on the purchaser's default (*q*). It appears doubtful whether the vendor can, in the absence of express stipulation in the contract of sale, resell on the purchaser's default without an order of the Court. If the vendor, apart from any condition of sale in the contract, elects to rescind the contract altogether (as he may do in certain cases, *e.g.*, if the purchaser has accepted the title and yet refuses to pay the price), and then resells the land, he resells in his capacity of owner. In this case if the land realises a higher price, he is entitled to keep the surplus; if the price be lower he cannot claim the difference from the purchaser. But if the land is resold under an express power of sale, given by the contract of sale, on the purchaser's default, the contract is rescinded and the vendor can retain any surplus on the original price, but yet if the resale were at a lower price he can claim the difference, allowing for the deposit (*r*).

Equitable remedy of specific performance.

Either vendor or purchaser can elect to sue for an order that the contract be specifically performed. Specific performance can sometimes be obtained when there is no right to recover damages (*e.g.*, when a parol contract has been partly performed by the plaintiff), but, as a rule, a plaintiff suing for specific performance must prove that there is an unimpeachable contract between himself and the defendant, and that the defendant has failed or refused to carry it out; and any defence which could be set up in an action on the contract at common law will, in general, defeat an application for specific performance. Thus the defence that there is no sufficient memorandum in writing of the contract under the Statute of Frauds can be pleaded except where there have been acts of part performance by the defendant distinctly referable to the contract, or where it would be a fraud for the defendant to rely on the Statute of Frauds, or where the sale has been ordered by the Court (*s*). In addition to the defences which would bar an action for

(*q*) *Shuttleworth* v. *Clews* [1910] 1 Ch. 176.
(*r*) Wms. V. & P. 1058-9.
(*s*) Wms. V. & P. 1091, *et seq.*

breach of the contract at law, the defendant can set up certain equitable defences, *e.g.*, unfairness, hardship, want of mutuality, laches. Thus if a contract of sale stated that the vendor's title should begin with "an indenture dated" (such and such a date), the purchaser is justified in assuming that the indenture is a conveyance of land for valuable consideration. Suppose, on investigation of the title, the said indenture is found to be a voluntary conveyance. The vendor cannot obtain specific performance, as the condition of sale is considered in a Court of equity to be misleading, but the purchaser cannot recover his deposit or expenses of investigating the title, because these are common law remedies, and at common law he is bound by the terms of the contract (*t*). If the vendor has innocently made an error in the description of the property, and the difference is incapable of estimation at a money value, *e.g.*, land sold as unincumbered land is subject to restrictive covenants, the purchaser cannot obtain specific performance, unless he chooses to take the land without compensation for the misdescription (*u*). An infant cannot obtain specific performance, because the agreement could not be enforced specifically against him and therefore the remedy is not mutual. An action for specific performance must be brought within a reasonable time (which would vary according to the circumstances of each particular case), otherwise the plaintiff's right would be barred by his laches or delay. Mistake coupled with great hardship is a ground for refusal of specific performance. Whether unilateral mistake apart from great hardship is a ground for refusal of specific performance in equity, *e.g.*, when a purchaser by his own mistake, due to his own inadvertence, has signed a contract to buy a property different from that which he intended to buy, is a matter not free from doubt. Mr. Cyprian Williams (*v*) considers that it is not. In one case (*w*), it was argued that if a defendant, through his

(*t*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.
(*u*) *Rudd* v. *Lascelles* [1900] 1 Ch. 815.
(*v*) Wms. V. & P. 761, 776.
(*w*) *Van Praagh* v. *Everidge* [1903] 1 Ch. 434.

own inadvertence, bids at an auction for Lot 1, under the impression that he is bidding for Lot 2, and Lot 1 is knocked down to him, he could resist specific performance on the ground of mistake; but the case was decided against the plaintiff on other grounds.

Vendor's lien.

When the vendor has conveyed the land to the purchaser before having received the whole of the purchase money he has an equitable lien on the land for the amount remaining unpaid. This lien may be enforced by an application to the Court for a resale of the property. The contract is not thereby rescinded, any surplus of price belongs to the purchaser, and, if the land be resold at a lower price, the vendor may claim the difference (*x*).

Purchaser's lien.

When the purchaser lawfully rescinds the contract, he has an equitable lien on the land sold for any money paid to the vendor by way of deposit or otherwise on account of the purchase money, and interest thereon, and also, it seems, for his expenses incurred in pursuance of the contract. The purchaser's lien is enforceable in the same manner as the vendor's lien for unpaid purchase money (*y*).

Effect of lien.

An equitable lien may be enforced against the land in the hands of anyone except a person who has acquired a legal estate or interest in the land sold as purchaser for value without notice of the lien. But the lien may be lost by negligence (*z*); and it may be waived or abandoned. Such abandonment will not be implied merely from the fact that the vendor has accepted the purchaser's bill of exchange or promissory note or taken his bond for payment of the amount due (*a*). A vendor's lien on the land sold for unpaid purchase money is not required to be registered by the Middlesex Registry Acts, but by the Yorkshire Registries

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(*x*) Wms. V. & P. 1058-9.
(*y*) Wms. V. & P. 1053-4; *Re Furneaux and Aird's Contract* [1906] W. N. 215.
(*z*) *Rice* v. *Rice*, 2 Drew. 73.
(*a*) *Mackreth* v. *Symmons* 15 Ves. 329.

Act, 1884 (*b*) no lien on any lands in Yorkshire in respect of any unpaid purchase money shall have any effect against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum of such lien has been registered in accordance with the Act. An equitable lien on land may be barred by lapse of time (*c*).

(*b*) 47 & 48 Vict. c. 54, s. 7.
(*c*) Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 8.

CHAPTER III.

OF PURCHASE DEEDS (*a*).

We now come to the consideration of those Purchase Deeds which form the final step in carrying out contracts for the sale of land, and cause them to lose their character of executory, and to assume that of executed, contracts. And in doing this, we propose to notice, in turn, the various clauses of which such a deed is composed, pointing out, when necessary, the different ways in which they are framed, according as the estate dealt with is freehold, copyhold, or leasehold.

Division of a purchase deed.

An ordinary purchase deed may be conveniently divided into the following parts:—Date; Parties; Recitals; Testatum; Consideration; Receipt; Operative Words; Parcels; Exceptions and Reservations, if any; Habendum; Covenants and Acknowledgment and Undertaking if necessary; Testimonium. Of these the part of the conveyance down to and including the exceptions and reservations is termed the Premises.

Date.

A modern deed begins by stating "This Indenture made on" (such and such a date). The date is not, strictly speaking, part of the deed. A deed is made from the date on which it is delivered. Hence if the date stated is different, it will not be the true date but oral evidence is admitted to prove the date of delivery. If the recited date is erroneous or impossible (*e.g.*, the 30th of February), this does not affect the validity of the deed (*b*).

(*a*) See Appendix of Forms I. to IV., IX., XV., XXIII.
(*b*) *Goddard's Case*, 2 Rep. 46.

Parties.

Next come the Parties to the deed. These should, in general, comprise, besides the vendor and purchaser, every person from whom any legal or equitable estate or interest is transferred to the purchaser; or whose consent or concurrence is necessary to make a perfect conveyance, and also all persons who enter into any of the covenants contained in the deed. The most convenient order of their arrangement is to place first the party or parties from whom the legal estate in the property is transferred; next, any persons whose concurrence is requisite, or who enter into any covenants; and last, the party or parties to whom the legal estate is to be given by the deed. Thus in the case of a conveyance by a mortgagor and first and second mortgagees the order would be 1st, first mortgagee; 2nd, second mortgagee; 3rd, vendor; 4th, purchaser (*c*). The names and descriptions of all the parties should be set out in full, so as to prevent any difficulty in their subsequent identification, but a deed is not invalidated by a defect in this respect, so long as the name or description given to any party is that by which he, or she, is generally known (*d*).

Recitals.

After the parties come such Recitals as may be considered necessary. Recitals are of two kinds, namely, narrative recitals, which set out the facts and instruments necessary to show the title and the relation of the parties to the subject-matter of the deed (*e*); and introductory recitals, which explain the motives for the preparation and execution of the deed.

Narrative recitals.

If the person who conveys the property is seised in fee, the narrative recitals commence with the recital of his seisin or with the deed by which the property was conveyed to him; or, if he be a copyholder seised of a customary estate of inheritance, they commence with his admission. In other cases they generally commence with the creation of his interest and trace all the dealings with it down to the time of the execution of the deed in preparation (*f*).

(*c*) Elph. Conv. 68
(*d*) *Williams* v. *Bryant*, 5 Mee. & W. 447.
(*e*) 1 Dav. Con. 44.
(*f*) Elph. Conv. 73.

Recitals may sometimes be used as statements of facts tending to validate the title in the case of subsequent sales, bearing in mind the effect of the Vendor and Purchaser Act, 1874 (*g*), (which, it will be remembered, makes all recitals twenty years old at the date of the contract, unless proved to be inaccurate, sufficient evidence of the statements contained in them). Under that Act it was held that, in the case of a contract containing no stipulation as to the commencement of the title, a recital in a conveyance more than twenty years old, that the then vendor was seised in fee-simple of the property, was sufficient evidence of that fact, and precluded the purchaser from requiring any earlier title to be shown, unless he could prove that the recital was inaccurate (*h*); but this decision was dissented from in a more recent case (*i*).

Introductory recitals.

Introductory recitals, when used, should come immediately after the narrative recitals, which they connect with the rest of the deed by showing why, and how, the state of things previously existing is about to be altered by the deed. It follows that introductory recitals are unnecessary when the deed contains no narrative recitals, nor is their employment essential in every case where narrative recitals have been introduced. But whenever there have been narrative recitals, an introductory recital, stating an agreement for the sale or purchase of the property at the price fixed, makes the deed more complete and scarcely adds to its length. This recital should not refer to the formal written agreement, or to the conditions of sale (whichever may have been used), except in cases when it is necessary to do so, as in that of a sale under an order of Court.

When recitals are to be used.

In the simplest form of purchase deeds no recitals of any kind need be introduced, although, having regard to what is stated below, it is generally inadvisable to omit them altogether (*j*); and opinions would appear to be somewhat

(*g*) 37 & 38 Vict. c. 78, s. 2.
(*h*) *Bolton* v. *London School Board*, 7 Ch. D. 766.
(*i*) *Re Wallis and Grout's Contract* [1906] 2 Ch. 206.
(*j*) See Elph. Conv. 79.

divided as to the extent to which they should be used, even in preparing more complicated deeds. There can, however, be no doubt that the tendency of modern conveyancing is to do away with the amount of unnecessary recitals, as well as to omit the verbiage, with which deeds of all kinds were formerly overloaded. The better rule appears to be, that recitals are necessary whenever the deed itself does not clearly imply for what purpose any person joining in it is made a party; or whenever the covenants into which he enters show that he has only a qualified interest in the property sold. From this it would follow that recitals are requisite in all cases where the property is vested in different persons, each having a partial estate; or in trustees, or others, selling under a power of sale; and also, whenever the estate is subject to incumbrances which are noticed in the deed. Recitals would always be necessary in a deed of release.

Recitals should, as a rule, be in general terms.

On the assignment of leaseholds, if all the premises comprised in the lease are assigned, it is customary to describe them fully in the recitals, by setting out the parcels as worded in the original lease; and then in the operative part (or that in which the property is transferred to the purchaser) to describe them merely by reference to that lease. In other cases, as we shall see presently, the parcels are described fully in the operative part. Subject to the exception just noticed in the case of leaseholds, care should be taken that the recitals are expressed in general terms; since otherwise they may conflict with the operative part. If the operative part of the deed is clear and precise, nothing contained in the recitals will control it; but if the recital be clear and precise and the operative part ambiguous or general in its terms, the recital will be held to explain and limit the meaning of the operative part (*k*).

When they estop.

It may be added that recitals in a deed estop all persons on whose behalf they are made from disputing their

(*k*) Elph. Conv. 72; *Ex parte Dawes*, 17 Q. B. D. 286; *Crouch* v. *Crouch* [1912] 1 K. B. 378.

accuracy, but that they cannot bind any other parties to the deed. In order that a recital may operate by estoppel, it must be clear and unambiguous. Thus a recital that a vendor is "seised in fee-simple" estops the vendor and those claiming through him from alleging that he was not seised in fee at the date of the deed; but if the recital stated that the vendor is "seised or otherwise well entitled to" the property, this would not estop a person claiming under the vendor from denying that he had the legal estate (*l*).

Benefit of recitals.

Recitals, then, are useful from the point of view of the purchaser, because (1) they may act as estoppels against the vendor and those claiming under him; (2) they explain the operative part of the deed; (3) they are evidence after twenty years and are, therefore, useful to the purchaser or his successors in proving the title on any subsequent sale.

What should not be recited.

It is, as a rule, unnecessary to recite conclusions of law or negative events, although, if a will is recited, it is the practice to recite that the testator died without having revoked or altered it (*m*).

Deed of release.

In a deed of release (*e.g.*, by *cestuis que trustent* of their trustees) containing recitals the operative words will be construed as having reference only to the matters set forth in the recitals (*n*). The deed should, therefore, contain very full recitals setting forth the title of the parties giving the release and the matters in respect of which the release is intended to be granted.

Supplemental deed.

Sometimes, in order to save the necessity of long recitals, a deed may be made supplemental to another deed. Thus a reconveyance of a mortgage can be made by a supplemental deed indorsed on the mortgage deed; but this can only be

(*l*) Elph. Conv. 71; *Heath* v. *Cradock*, L. R. 10 Ch. 22; *General Finance etc. Co.* v. *Liberator Building Society*, 10 Ch. D. 15; *Onward Building Society* v. *Smithson* [1893] 1 Ch. 1.

(*m*) Elph. Conv. 49.

(*n*) *Payler* v. *Homersham*, 4 M. & S. 423.

done when both mortgagor and mortgagee are clients of the same solicitor. The supplemental deed contains a conveyance without any recitals by the mortgagee "as mortgagee" to the mortgagor free from "all principal moneys and interest intended to be secured by the within written indenture."

Operative part.

The next division of the premises consists of the operative part, *i.e.*, testatum, consideration, receipt clause and operative words. This operative part commences with a witnessing clause, termed the testatum, which refers to the introductory recital of the agreement (where this recital has been used) and also states the consideration which is to be paid. It was formerly usual to have the receipt of the purchase-money acknowledged parenthetically in this part of the body of the deed, and also to indorse a formal receipt for it, signed by the vendor, on the back of the instrument. Either an acknowledgment in the body of the deed or an indorsed receipt was sufficient, in equity, to relieve a subsequent purchaser from the necessity of ascertaining that the consideration had been, in fact, paid, although neither of them estopped the vendor or persons claiming under him from showing, as against the purchaser from him, that the consideration remained unpaid (*o*). With reference to deeds executed after the 31st December, 1881, the Conveyancing Act, 1881, has enacted (*p*) that a receipt for consideration money in the body of a deed shall be a sufficient discharge for the same to the person paying the same, without any further receipt for the same being indorsed on the deed; and that a receipt for consideration money, or other consideration, in the body of a deed or indorsed thereon, shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof. It follows that a receipt, either in the body of the deed or indorsed, renders any other receipt superfluous.

Receipt clause and endorsement.

(*o*) *Lee* v. *Lancashire Ry. Co.*, L. R. 6 Ch. 527.
(*p*) 44 & 45 Vict. c. 41, ss. 54, 55.

Formerly, payment to the solicitor for the vendor was not a valid payment in the absence of express authority from the vendor to the solicitor to receive the money. But the Conveyancing Act, 1881, now provides (*q*) that the production by a solicitor of a deed containing a receipt or having an indorsed receipt (the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt) shall be sufficient authority for the payment of the purchase money to the solicitor. By the Trustee Act, 1893 (*r*), this provision applies also to the case where the vendors are trustees. But it is not enough for the solicitor to have the deed in his office without actually producing it; and it has been said that the person producing the deed must be a solicitor acting for the party to whom the money is expressed to be paid (*s*), but this statement has since been questioned (*t*).

Consideration.

A contract under seal does not require any consideration to support it as between the parties, but if there be consideration it is advisable to express it in the conveyance for the following reasons: (1) It rebuts a resulting use to the grantor which would otherwise arise if no use is expressed and no consideration is given. If the words "unto and to the use of" the grantee are inserted in the habendum, as is usual, this prevents a resulting use even if no consideration is expressed, but it is the practice to set forth the consideration as well. (2) It is evidence that the deed was not voluntary, and therefore not liable to be upset under the Statute of Elizabeth (*u*) or the Bankruptcy Act, 1914 (*v*). (3) It is followed by the receipt clause, the advantages of which have been already explained. (4) By the Stamp Act, 1891 (*w*), a penalty of £10 is imposed on any person who, with intent to defraud, does not fully and truly set forth all the facts and

(*q*) 44 & 45 Vict. c. 41, s. 56.
(*r*) 56 & 57 Vict. c. 53, s. 17.
(*s*) *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491.
(*t*) *King* v. *Smith* [1900] 2 Ch. 425; Elph. Conv. 106.
(*u*) 13 Eliz. c. 5.
(*v*) 4 & 5 Geo. 5, c. 59, s. 42, subs. 1.
(*w*) 54 & 55 Vict. c. 39, s. 5.

circumstances affecting the liability of the instrument to or the amount of *ad valorem* duty chargeable.

Character in which persons convey.

The operative part next has words showing the character in which each conveying party joins in the deed. These words are introduced in consequence of a change made by the Conveyancing Act, 1881. Before that Act came into operation it was the practice for the conveying parties to enter into covenants relative to their title to the property, these covenants corresponding in extent to the nature of their interest in the property. The Act aimed at shortening conveyances by providing that the covenants which it was usual to insert shall be implied in every case where a person is expressed to convey in certain named characters. It therefore enacted (*x*) that in a conveyance made after the 31st December, 1881, there shall be deemed to be included a covenant to the effect stated in the Act by the person, or each person, who conveys, so far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common.

Implied Covenants Conveyancing Act, 1881.

For right to convey.

These covenants are substantially the same in a sale of freeholds, copyholds, or leaseholds. Where the vendor is expressed to convey as beneficial owner, his covenant for title is to the effect, first, that notwithstanding anything done by himself or by any person through whom he claims title otherwise than by purchase for value, he has a right to convey the property according to the terms of the deed.

For quiet enjoyment.

Next, he covenants that the purchaser shall, from thenceforth, peaceably enjoy the premises without any molestation by himself or by any person conveying by his direction or lawfully or equitably claiming under him or under any person through whom he derives title otherwise than by

(*x*) 44 & 45 Vict. c. 41, s. 7.

purchase for value; and that the property is free from any incumbrances, created by himself or by any person claiming through, or in trust, for him or by any person conveying by his direction, or through whom he derives title otherwise than by purchase for value. And the covenant concludes by an undertaking on the part of the vendor that he and all persons claiming through him, or under any person conveying by his direction, or through whom he derives title otherwise than by purchase for value, will, at the purchaser's expense, do anything which may be reasonably required to perfect the assurance of the property to the purchaser.

Free from incumbrances.

For further assurance.

The words "purchase for value" in the qualifying clause do not include a conveyance in consideration of marriage.

The Act also says that when a person, as beneficial owner, directs another to convey, he is to be deemed to have entered into the covenant above stated, and that where a husband and wife each convey as beneficial owner, the wife is to be deemed to convey by direction of the husband, so that in addition to her implied covenant, the husband is to be deemed to covenant for her as well as on his own behalf.

Effect of these implied covenants.

If the implied covenant that the vendor has the right to convey is broken, it is broken once and for all upon the execution of the conveyance by reason of the existence of some defect in the title to the property expressed to be conveyed, *e.g.*, if the property is subject to leases, easements, or restrictive covenants unnoticed in the conveyance. The vendor will then become liable upon the statutory covenant for title immediately upon the execution thereof. The implied covenants for quiet enjoyment and freedom from incumbrances secure the purchaser against interruptions of title and disturbances from incumbrancers, and are not broken until such interruption or disturbance takes place (*y*).

It is not necessary, as it was formerly, to state that a person covenants on behalf of himself, his heirs, executors,

By whom, and with whom, covenants

(*y*) Elph. Conv. 109-10.

for title are entered into.

and administrators, the Conveyancing Act having provided (*z*) that a covenant under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same; and also (*a*) that the benefit of implied covenants for title shall be annexed and incident to, and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested. The covenants, therefore, "run with the land," *i.e.*, can be enforced not only by the purchaser, but also by persons claiming under him. Thus if A "as beneficial owner" conveys land to B, and B sells to C, C can sue A for breach of the covenant for quiet enjoyment if C is disturbed in his possession owing to A's title being defective (*b*). Every vendor who is the absolute owner of the property which he sells is bound to covenant as beneficial owner; as is also a husband on the sale by him and his wife of the latter's real estate not held to her separate use.

Absolute owner.

Trustee

If the vendor is expressed to convey as a trustee, or a mortgagee, he enters into no implied covenant except that he himself has not incumbered the property. And the result is the same on a sale by persons expressed to be executors or administrators of a deceased person, or the committee of a lunatic. In the case of a sale by a trustee, it was the settled practice of conveyancers, in the absence of any special condition, to make all the beneficiaries who took a substantial interest in the proceeds of the sale enter into covenants for title to the extent of that interest; from which it would follow that they should now enter into an implied covenant for title, as beneficial owners, to the same extent. It is, however, doubtful how far this practice can be enforced; and it has been decided that it could not, where the trustee was selling under the order of the Court (*c*). On the other hand, it has

Cestui que trust.

(*z*) S. 59. (*a*) S. 7, sub-s. 6.
(*b*) *David* v. *Sabin* [1893] 1 Ch. 523.
(*c*) *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330.

been held that where a sale was made by a trustee under a power which only authorised the sale at the direction of a tenant for life, the latter must enter into the usual covenants for title (*d*). It would seem, however, that any limited owner who sells under a statutory power need not enter into covenants for title extending beyond his own interest, if the nature of his interest appears from the contract of sale (*e*), and that owners of land whose estates are altogether taken compulsorily, as, for instance, by a railway company, need not enter into any covenants at all. It may be added that the Crown, if selling land, never enters into covenants for title.

The Crown.

Limitation of time for suing on these covenants.

3 & 4 Will. 4, c. 42.

The time for bringing an action on covenants for title is limited by the 3 & 4 Will. 4, c. 42, to twenty years from the date when the cause of such action arose. The time for bringing actions on the covenant that a vendor has a good right to convey, and also on that against incumbrances, when entered into by trustees, begins to run from the date of the conveyance; but that for bringing actions on any of the other covenants for title entered into by an ordinary vendor does not begin to run until some actual breach of the covenant in question.

Covenants on a sale of leaseholds.

On a sale of leaseholds, a vendor who conveys as beneficial owner also enters into an implied covenant to the effect that the lease which he assigns is valid and subsisting, and that the rents and covenants of the lease have been, respectively, paid and observed, so far as he is concerned, up to the date of the conveyance (*f*). The Conveyancing Act, 1881, has not implied any covenant on the part of the purchaser, although there is, apart from the Act, an implied covenant by each successive assignee to indemnify the original lessee against breaches of covenant occurring during his own tenancy (*g*). But this implied

(*d*) *Poulett* v. *Hood*, L. R. 5 Eq. 115.
(*e*) Wms. V. & P. 656.
(*f*) 44 & 45 Vict. c. 41, s. 7, sub-s. 1. The word "conveyance" in the Act includes, in general, any kind of assurance.
(*g*) *Moule* v. *Garrett*, L. R. 7 Ex. 101.

covenant does not bind the assignee after he has reassigned. The purchaser of a lease therefore, when buying a lease, still covenants in express terms, as he did before the Act, that he will, from thenceforth, pay the rent and observe the covenants, and indemnify the vendor against any further liability in this respect until the end of the lease. The covenant by the purchaser that he will indemnify the vendor against any further liability in respect of the rent and covenants of the lease is one which he cannot refuse to give. But if the vendor of the lease will not remain liable after the assignment of the lease to the purchaser for any future failure to pay the rent or keep the covenants, as when he is himself an assignee of the lease who did not covenant expressly to indemnify his assignor generally against the rent and covenants, he cannot require the purchaser to covenant to indemnify him (*h*). On this point it may be remarked that when a vendor is himself an assignee of a lease, a purchaser from him is liable to indemnify the original lessee against breaches of covenant in the lease, committed during his own tenancy, without reference to the covenants which such a purchaser may have entered into with his vendor (*i*).

Words of conveyance.

The operative part includes also the words of conveyance, or "operative words," which transfer the property: these varying according to the nature of the estate. It will be remembered that all hereditaments now lie in grant. Hence the word "grant," alone, is the best to be used in an ordinary conveyance of freehold land to a person who has had no previous interest in it, although other words will do as well (*j*). Where the grantee has already some estate in the land, the words "release" or "surrender," as the case may be, are more appropriate. If the vendor is acting under a power the word "appoint" is best, and if he has a mere power of sale without any legal estate (as in the case

(*h*) *Staines* v. *Morris*, 1 Ves. & B. 9; *Harris* v. *Boots &c. Ltd.* [1904] 2 Ch. 376; Wms. V. & P. 668; *Wilkins* v. *Fry*, 1 Mer. 244.
(*i*) *Moule* v. *Garrett*, L. R. 7 Ex. 101.
(*j*) 44 & 45 Vict. c. 41, s. 49.

of an executor selling copyholds under a power in a will), the words "bargain and sell" are commonly employed (*k*). A party joining to transfer a beneficial interest should "confirm" the assurance of the property. But it will be understood that the various expressions given above are merely those which are considered most appropriate; and that a deed will not, necessarily, fail of effect from the mere use of an inappropriate word, provided that the intention of the conveying parties appears clearly. If the property is copyhold, it can only be legally transferred by a surrender and admittance recorded on the court rolls. The purchase deed, consequently, in this case, takes the form of a covenant by the vendor that he will make the necessary surrender, in order to enable the purchaser to obtain admittance. If the property is leasehold, the vendor "assigns" it to the purchaser.

The Parcels.

The operative part is followed by the description of the property. This is technically known as the Parcels, and should, when practicable, be the same as in former title-deeds, so as to prevent any question as to the identity of the property conveyed with that comprised in such deeds. When this is not possible there should be a reference connecting the parcels with former descriptions, but without specifying the deeds in which they are so described. Except in small purchases, it is preferable that the parcels should refer to, and be accompanied by, a map or plan of the property, drawn on the deed. When the parcels are numerous, they may be conveniently set out in a schedule to the deed, the schedule and map being referred to in the words of conveyance. Words of a more or less technical nature are usually employed in the description of the property. Thus a house is usually described as a "messuage," and this word includes the outbuildings, court-yard and garden occupied with the house, unless the context shows that a different meaning was intended. "Tenement" means properly land and anything which is the

Description by reference to a plan.

Schedule.

Words of description

(*k*) Elph. Conv. 115; *Sissons* v. *Chichester Constable* [1916] 2 Ch. 75.

subject of tenure, but is generally used as equivalent to house or messuage. "Hereditaments," when used in a conveyance, is a word applicable to all interests in land.

Presumptions.

There is a presumption that the owner of land abutting on a highway, or non-tidal river, is the owner of the land forming the road, or the bed of the river, up to the middle line, and that when he conveys the land to a purchaser, he intends to convey, not merely the land as set out in the map or described in the parcels, but also his half of the site of the road or bed of the river (*l*). Where two plots of land are separated by a hedge and an artificial ditch, there is a presumption that the hedge and ditch belong to the owner of the land on that side of the ditch on which the hedge is (*m*).

General words.

After the parcels there formerly came what were known as the General Words; those, namely, which purported to convey to the purchaser all rights and easements, profits *à prendre*, and other rights appendant or appurtenant to the property, or at any time enjoyed with it, or reputed to form part of it. Rights which are appendant or appurtenant will pass by the conveyance of the land to which they are annexed; and in this case the General Words were not strictly necessary, but they were added to show an express intention that such rights should be included in the grant (*n*). Reputed or quasi easements (*e.g.*, when a person has become owner of both servient and dominant tenements but has continued to exercise the right which, before the merger, was an easement), used not to pass without being expressly mentioned; and words sufficient to pass such reputed or quasi easements were always included in the General Words (*o*). These General Words can now be altogether omitted, the Conveyancing Act, 1881, containing a section (*p*) which says that a conveyance of land shall be deemed to include, and shall operate to convey

(*l*) *Land Tax Commissioners* v. *Central London Railway* [1913] A. C. 364.
(*m*) *Marshall* v. *Taylor* [1895] 1 Ch. 641.
(*n*) Elph. Conv. 120.
(*o*) Elph. Conv. 122-3.
(*p*) S. 6.

with the land, all the easements and other incidents and accessories enumerated by the Act, which are the same as those formerly designated in conveyances. A reference to these easements and other rights will therefore be unnecessary, excepting when it is desired that any of them shall not pass by the conveyance, the section just referred to applying only if and as far as a contrary intention is not expressed in the conveyance, and having effect subject to the terms of the conveyance and the provisions therein contained. If the owner of a house and land habitually uses some right over the land in respect of the house which would, if the house and land belonged to different persons, be an easement (*e.g.*, he draws water for the house from a well in the land), and he then conveys the house to a purchaser, and it is intended that this right should pass to the purchaser, it should be expressly mentioned in the conveyance. If it is not intended to pass, the operation of the Conveyancing Act, 1881, section 6, should be restricted or excluded from the conveyance (*q*). The Act of 1881 does not, except in the case of a manor, mention "mines and minerals," but these pass by the conveyance of the land (unless expressly excepted), with a few statutory exceptions such as in conveyances to railway companies under their statutory power of purchase, and except in the case of copyholds (*r*).

Exceptions and reservations.

All exceptions and most reservations out of the property granted should follow the parcels. An exception is something in existence at the date of the grant which is excepted by the grant, *e.g.*, an exception of minerals. A reservation is something not in existence at the date of the grant but newly created by the grant, *e.g.*, when the vendor is to have a right of way or other easement over the property sold or when rent is reserved. (But an easement created for the grantor is not, strictly speaking, a reservation, but

(*q*) Elph. Conv. 123-4; *Re Peck and London School Board* [1893] 2 Ch. 315; *Schwann* v. *Cotton* [1916] 2 Ch. 120; *Re Walmsley and Shaw* [1917] 1 Ch. 93.

(*r*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 77; Elph. Conv. 124.

the easement takes effect as a regrant by the purchaser if the deed is executed by him. If not executed by the purchaser, it creates an equitable right (*s*).) Reservation of rent is inserted not after the parcels but after the habendum.

Estate Clause.

Until the Conveyancing Act, 1881, came into operation it was usual for the parcels and general words to be followed by what was known as the "Estate" Clause, which finished this part of the deed by a general transfer of all the vendor's estate and interest in the property. This clause was, as had been generally pointed out, simply useless; and its retention only showed the difficulty of altering any long-established custom. Now, however, it should be omitted, the Act having provided (*t*) that every conveyance made after the 31st December, 1881, shall, if and so far as a contrary intention is not expressed in it, pass all the estate, title, interest, claim, and demand which the conveying parties respectively have in, to, or on, the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

Habendum.

This finishes the premises, and we come next to the Habendum, which, commencing with the words "To have and to hold," is intended to define the estate of the purchaser. In a modern deed the words "to have and" are often omitted. Except in the case of a grant to a corporation aggregate (such as a municipal corporation or a public company), or a release by two or more joint tenants or co-parceners to the others or other of them, an estate of inheritance in fee-simple will not pass to the grantee without express words of limitation. Before 1882, if it was intended to grant an estate in fee-simple, it was necessary to limit the property to the grantee "and his heirs," or in the case of a corporation sole (other than the Crown) to him "and his successors." To create a fee tail it was

(*s*) Elph. Conv. 125; *May* v. *Belleville* [1905] 2 Ch. 605.
(*t*) S. 63.

necessary to convey the land to the grantee "and the heirs of his body," if the fee was in tail general, or to "the heirs male of his body" and "heirs female of his body," if the fee was to be in tail male or tail female. The old words of limitation can still be employed, but by virtue of the Conveyancing Act, 1881 (*u*), in regard to deeds executed after the commencement of the Act, it is sufficient, in the limitation of a fee-simple, to use the words "in fee-simple," without the word "heirs," and in the limitation of an estate in tail to use the words "in tail" without the words "heirs of body," and in the limitation of an estate in tail male and tail female to use the words "in tail male" or "in tail female," as the case requires, without the words "heirs male of the body" or "heirs female of the body." But the enactment does not permit any other terms than "fee-simple," etc., to be substituted for the old words of limitation. Therefore if land is conveyed to A "in fee," A would take a life estate only (*v*). Nor does the section apply to grants to corporations, and therefore in a conveyance to a corporation sole (other than the Crown) it is still necessary to use the word "successors." But if the grantor has only an equitable estate in fee-simple, it will pass without words of limitation, if the deed is so made as to show that this is the intention (*w*), *e.g.*, the grant is made to the grantee "absolutely."

In the ordinary case of a conveyance to the purchaser in fee-simple, the use is always declared in his favour in some such form as "unto and to the use of A in fee-simple." The declaration of the use, though not strictly necessary in the case of a purchase for value, is always inserted, partly because it is inadvisable to depart from a form of words sanctioned by long usage. If the conveyance is not for value, the words "to the use of" are

(*u*) 44 & 45 Vict. c. 41, s. 51.
(*v*) *Re Ethel and Mitchells and Butler's Contract* [1901] 1 Ch. 945.
(*w*) *Re Tringham's Trusts* [1904] 2 Ch. 485; *Re Nutt* [1915] 2 Ch. 431; *Re Gillies' Settlement* [1917] 2 Ch. 205; *Re Murphy and Griffin's Contract* [1919] 1 Ir. R 187.

necessary in order to prevent a resulting use to the grantor (*x*).

Where a conveyance operates merely as the declaration of a use, *e.g.*, land has been granted to A and his heirs to such uses as B shall appoint, and subject thereto to the use of C and his heirs, and B exercises the power in favour of a purchaser, no habendum is inserted; the common law seisin is already vested in someone, and the object of the conveyance is to state to what uses he is to hold the land. Such a power of appointment is sometimes given in a settlement to trustees, when it is desired to give the trustees a power of sale without conferring on them the legal estate in the land (*y*).

When the conveyance is made subject to or free from estates or incumbrances they ought to be noted in the habendum (*z*).

Acknowledgment of right to production.

It frequently happens that all the title-deeds relating to the property conveyed are not handed over to the purchaser. They may be required by the vendor in support of his title to other property belonging to him; or they may not be in his possession at all. The Vendor and Purchaser Act, 1874, enacted (*a*) that when the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents. In the days when express covenants for title were put into purchase deeds, their place was next after the habendum. And if any part of the title-deeds were retained by the vendor, these covenants were followed by a further covenant by him that he, his heirs, or assigns would produce the title-deeds in question to the purchaser, or to any person lawfully claiming under him, whenever reason-

(*x*) Elph. Conv. 12; 129.
(*y*) Elph. Conv. 10; 128.
(*z*) See Precedent III.
(*a*) 37 & 38 Vict. c. 78, s. 2, r. 5.

ably requested so to do; and would, in the meantime, keep the deeds safe, unless prevented by fire or other inevitable accident. In the case of a trustee the covenant was limited so as to affect him, or his estate, so long only as he had custody of the deeds. The Conveyancing Act, 1881, substituted (*b*) for these covenants an acknowledgment by the vendor of the purchaser's right to production of the title-deeds and an undertaking for their safe custody. These are now adopted in place of the old covenant for production and safe custody with the advantage of shortening the wording of the deed. If the vendor is a trustee or mortgagee, he merely gives an acknowledgment of the purchaser's right to production. This binds him to produce the deeds whilst they are in his custody, but does not impose upon him any liability on account of loss or destruction of, or injury to, the deeds, from whatever cause arising. An obligation to produce deeds can, if necessary, be enforced by means of an application to the High Court. Both acknowledgment and undertaking bind the person giving them so long only as the documents are in his possession, but the obligations run with the possession of the documents and the benefit of them runs with the interest of the person to whom the acknowledgment and undertaking were given. Only the person who retains possession of documents is capable of giving an acknowledgment and undertaking under the Conveyancing Act, 1881, section 9.

Thus if a mortgagor sells part of the mortgaged lands, proposing to convey with the concurrence of the mortgagee, who will have the right to retain possession of the title-deeds, the mortgagee is the only person who can give a valid acknowledgment and undertaking. The mortgagee is usually unwilling to give the undertaking, although he will probably not object to give the acknowledgment. In this case the mortgagor should covenant to give the undertaking as soon as the title-deeds come into his possession

(*b*) S. 9.

and that, in the meantime, the possessor of the title-deeds shall keep them safe unless prevented by fire or other inevitable accident (*c*).

Covenants.

The purchaser of land must sometimes enter into covenants with the vendor. Thus when land is intended to be sold in lots for building purposes, or where portions of a residential estate are intended to be sold, the various lots or portions are offered for sale subject to stipulations and conditions intended to maintain the value of the remaining lots or of the adjoining property belonging to the vendor. The conditions of sale provide that the conveyance of each lot is to contain covenants by the purchaser for securing the performance of these stipulations and conditions so far as they affect the lot purchased by him. Sometimes a "building scheme" is drawn up, under which the purchasers of the several parts of the property will be entitled to the benefit, and subject to the burden, of the restrictive covenants, and can enforce them against the other purchasers and against the vendor in regard to any unsold lot (*d*). Affirmative covenants, *e.g.*, that the purchaser is to erect buildings or maintain fences on the property purchased by him, are, both in law and equity, binding on the purchaser only; and subsequent purchasers are not bound, even though they have notice of the covenants. But negative or restrictive covenants may, if the vendor is at the time of the conveyance owner of other land in the neighbourhood, be made binding in equity, and can be enforced by injunction, not only upon the purchaser, but also upon all persons subsequently taking the purchased property through him, except those who have acquired the legal estate in the land as purchasers for value in good faith without notice, actual or constructive, of the covenants. They are said to run with the land in equity,

(*c*) Wms. V. & P. 690; *Re Pursell and Deakin's Contract* [1893] W. N. 152.

(*d*) Elph. Conv. 135-6; *Renals* v. *Cowlishaw* 9 Ch. D. 125; *Spicer* v. *Martin*, 14 App. Cas. 12; *Reid* v. *Bickerstaff* [1909] 2 Ch. 320.

though not at common law (*e*). It has been held (*f*) that such restrictive covenants are binding on a person who has acquired the land by long possession. In regard to constructive notice, it must be remembered that a purchaser, buying under special conditions limiting his right to investigate the vendor's title, is held to have constructive notice of all restrictive covenants which he would have discovered if he had made the usual inquiries of a prudent purchaser buying under an open contract (*g*). Where land subject to restrictive covenants is taken by public bodies under the Land Clauses Consolidation Act, 1845 (*h*), and the parties entitled to the benefit of the covenants receive compensation, the covenants are extinguished. If such parties do not receive compensation, the burden of the covenants revives if the land should be resold as superfluous to ordinary persons (*i*). Restrictive covenants are not subject to the rule of perpetuities (*j*); but the right to enforce them may be lost if the plaintiff or his predecessors in title caused or permitted an alteration in the character of the neighbourhood (*k*).

Benefit of covenants.

A negative or restrictive covenant may be so worded that the benefit of the covenant may be annexed to property retained by the vendor and pass as incident thereto upon any subsequent conveyance by him. In order to have this effect, the property to which the benefit of the covenant is to be annexed must be clearly defined in the conveyance to the purchaser as the property for the benefit of which the covenant is entered into (*l*). In the case of "building schemes," when lands are laid out and sold in plots on a

(*e*) Elph. Conv. 137; Wms. V. & P. 491-2; *Tulk* v. *Moxhay*, 78 R. R. 289; *Millbourn* v. *Lyons* [1914] 2 Ch. 23.
(*f*) *Re Nisbet and Pott's Contract* [1906] 1 Ch. 387.
(*g*) Wms. V. & P. 254; *Wilson* v. *Hart* L. R. 1 Ch. App. 463; *Patman* v. *Harland*, 17 Ch. D. 353.
(*h*) 8 & 9 Vict. c. 18.
(*i*) Wms. V. & P. 492; *Kirby* v. *Harrogate School Board* [1896] 1 Ch. 437; *Ellis* v. *Rogers*, 29 Ch. D. 661.
(*j*) *Mackenzie* v. *Childers*, 43 Ch. D. 265.
(*k*) *Sobey* v. *Sainsbury* [1913] 2 Ch. 513.
(*l*) Elph. Conv. 138; *Rogers* v. *Hosegood* [1900] 2 Ch. 388; *Ives* v. *Brown* [1919] 2 Ch. 314.

building estate, where different purchasers derive their title from a common vendor, restrictive covenants may be enforced by one purchaser or his successors against another purchaser or his successors, and also against the vendor, if it is clear that the restrictive covenants were intended to be and were for the mutual benefit of all the purchasers in regard to all the lands offered for sale (*m*).

Conveyancing Act, 1911, s. 11.

The Conveyancing Act, 1911, provides (*n*) that if land having a common title with other land is disposed of to a purchaser (other than a lessee or a mortgagee) who does not hold or obtain possession of the documents forming the common title, such purchaser, notwithstanding any stipulation to the contrary, may require that a memorandum, giving notice of any provision contained in the disposition to him restrictive of user of, or giving rights over, any other land comprised in the common title, shall, where practicable, be indorsed on, or, where impracticable, be permanently annexed to, some one document selected by the purchaser but retained in the possession or power of the person who makes the disposition, and being or forming part of the common title. Thus an owner of land sells part of his land and enters into restrictive covenants as to the use of the land he retains. The vendor retains the title-deeds. The purchaser, by taking advantage of this section of the Act of 1911, can secure that any subsequent purchaser from the vendor of the land retained by the vendor shall have actual or constructive notice of the restrictive covenants and thereby be bound by them.

Testimonium.

Having thus gone through the essential parts of a purchase deed, it only remains to mention that the whole is concluded by a Testimonium, which sets forth that the several parties to the deed have duly affixed thereto their respective hands and seals; and to point out that the fact of their having done so should be attested by at least one witness. The testimonium is not an essential part of a

(*m*) *Elliston* v. *Reacher* [1908] 2 Ch. 374.
(*n*) 1 & 2 Geo. 5, c. 37, s. 11.

deed; and it is not strictly necessary at common law that the grantor should sign the deed or that the signature or delivery of it should be witnessed (although attestation to certain deeds is necessary by statute), yet, in practice, a deed is executed in the presence of one or more witnesses, who attest it. If a deed is made in execution of a power of appointment, the terms of which require special formalities in the execution of the deed, the deed may, nevertheless, be executed in the presence of and attested by two or more witnesses (*o*).

(*o*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35) s. 12; Elph. Conv. 56—7.

CHAPTER IV.

OF LEASES (*p*).

HAVING thus considered the instruments which relate to the sale of land, we come next to those which are employed when it is to be let. These leases will form the subject of discussion in this chapter. The simplest form perhaps of a lease is that of a dwelling-house and grounds for a short term of years which is to commence on, or very shortly after, the execution of the instrument of demise. And since our object is to deal only with the more ordinary and simple forms of conveyancing, we will confine our remarks to leases of this description. And, in so doing, we will follow the plan adopted in the case of purchase deeds, and divide our present subject into—1st, Agreements for Leases; and 2nd, Leases.

Investigation of title by lessee.

The Vendor and Purchaser Act, 1874, section 2, provides that, subject to any stipulation to the contrary contained in the contract to grant a lease, the intended lessee cannot call for the title to the freehold; and the Conveyancing Act, 1881, section 13, provides that on a contract to grant a lease out of a leasehold interest, with a leasehold reversion, the intended lessee is not, in the absence of a special stipulation in the contract to the contrary, entitled to call for the title to the leasehold reversion. Accordingly, on open contract for the grant of a lease or sub-lease, the intending lessee or under-lessee cannot call for the title to the freehold, and an intending under-lessee cannot call for the production of any superior lease, although he can call for the production of the lease under which his intending lessor holds (*q*). Thus if A, a freeholder, agrees by open contract to grant a lease to

(*p*) See Precedents XII. to XIV.
(*q*) *Gosling* v. *Woolf* [1893] 1 Q. B. 39.

B, B cannot call for A's title. If B afterwards by open contract, agrees to grant a sub-lease to C, C. can call for production of B's lease but not for production of A's title to freehold. If C, by open contract, agrees to grant a sub-sub-lease to D, D can call for the sub-lease to C, but cannot call for A's title to the freehold or production of the lease from A to B. But if the intending lessee can show that the title is bad, he will not be bound to accept the lease (*r*). These provisions as to open contracts are not, in practice, varied by express stipulation. But where there is no express stipulation as to investigation of the title, the intending lessee should, if the property is situated in a town or forms part of a building estate, inquire whether the lessor is restricted from using the property in any particular manner, because a lessee or under-lessee (in spite of the provisions of the Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881, preventing inquiry into the title on open contract) is held to have constructive notice of everything which he would have discovered if he had investigated the title (*s*).

Agreements for leases.

Agreements for leases may be classified under two headings; namely, those instruments which have been expressly entered into by the parties as agreements for leases, and those instruments which operate as agreements by construction of law, although not expressly entered into as such. Before, however, considering agreements for leases with reference to this classification, we have to say a few words on the statutory requisites relating to all such agreements generally.

Statute of Frauds.

Prior to the passing of the Statute of Frauds (*t*), any lease, and also any agreement for a lease, of land, might be made by parol. But by this statute it is enacted (*u*) that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or

(*r*) Elph. Conv. 296-7; *Jones* v. *Watts*, 43 Ch. D. 574.
(*s*) Elph. Conv. 297-8; *Patman* v. *Harland*, 17 Ch. D. 353; *Imray* v. *Oakshette* [1897] 2 Q. B. 218.
(*t*) 29 Car. II. c. 3.
(*u*) S. 4.

any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Part performance.

It follows, therefore, that no person is liable on a mere contract to grant, or take, a lease unless he has signed some written document which, either in itself or in conjunction with other writings, contains the substantial parts of the contract. But if something more has been done than simply entering into a non-binding agreement, the contract may come within the class of cases which are considered as taken out of the Statute of Frauds by part-performance. Thus, it has been held that possession taken by a lessee, and payment of rent by him, when these acts are distinctly referable to a parol or unsigned agreement, were sufficient to induce a court of equity to decree specific performance of the agreement, against either the lessor (*v*) or the lessee (*w*). And this rule extends also to the representatives of a lessor or of a lessee. Thus, where there had been a verbal agreement for a lease, and the lessee had entered into possession of the property, paid rent, and made improvements on the property, and afterwards died: it was held that his representatives were entitled to have, from the representative of the lessor, a formal lease, in terms corresponding to those of a draft lease found amongst the papers of the lessor, who was also dead (*x*).

Express agreements for leases.

Not in general desirable.

We now come to agreements for leases expressly entered into as such. We shall not, however, dwell long on this point, since, as a rule, preliminary agreements are neither usual nor desirable in the case of those ordinary leases with which alone we are concerned. Where the lease is to take effect at once, and is not to contain any but the ordinary

(*v*) *Pain* v. *Coombs*, 1 De G. & J. 34.
(*w*) *Kine* v. *Balfe*, 2 Ba. & B. 343.
(*x*) *McFarlane* v. *Dickson*, 13 Grant, 263. See also *Nunn* v. *Fabian*, L. R. 1 Ch. 35.

covenants, there can be no object in having a formal preliminary agreement (which can only be safely prepared by specifying precisely all the covenants and clauses which are to be inserted in the lease (*y*)), this agreement being immediately followed by a formal lease. Such agreements, consequently, are seldom entered into, except in cases where the intended lessee has to fulfil certain conditions before he becomes entitled to require a lease.

Stipulation which should be inserted when agreements are prepared.

With regard to formal agreements for leases, we will only call attention to a stipulation which should be inserted when these instruments are prepared by the conveyancer, premising that the fact of its being necessary, if there is an agreement, does not conflict with the statement that an agreement is not usually desirable. This stipulation is, that the lease is to contain a proviso for the forfeiture of the lessee's interest on the breach of any of his covenants: the necessity for this stipulation arising from the fact that under an agreement that a lease shall contain all "usual" clauses the forfeiture clause must be limited to the case of non-payment of rent (*z*).

It may be added that, in the absence of any special stipulation, the solicitor of the lessor prepares the lease and, unless otherwise provided, all the expenses attending the preparation of the agreement, and of the lease, fall upon the lessee (*a*), whilst the expense of preparing the copy of the lease retained by the lessor, and known as the "counterpart," must be borne by him (*b*). Hence if some different plan is contemplated it should be so stated in the agreement.

Usual and proper covenants.

It was remarked just now that an agreement for a lease could not be drawn safely unless it specified the covenants to be contained in the lease. But it may not be out of

(*y*) See Elph. Conv. 300.

(*z*) *Hodgkinson* v. *Crowe*, L. R. 10 Ch. 622; *Re Anderton and Milner's Contract*, 45 Ch. D. 476.

(*a*) *Grissell* v. *Robinson*, 3 Bing. N. C. 10; *Smith* v. *Clegg*, 27 L. J. Ex. 300.

(*b*) *Re Negus* [1895] 1 Ch. 73.

place to point out here how agreements will be construed which are either silent on the question of covenants or (which comes to the same thing) merely provide that the lease to be prepared shall contain the " usual " or " proper " covenants. Whenever an open agreement of this kind is executed, the law will imply a further agreement by both parties to enter into certain covenants which are applicable to all leases, and no covenants can, generally speaking, be inserted in a lease made in pursuance of an open agreement other than those which are implied by the law as being strictly incidental to the subject-matter of the contract. It seems to be pretty well settled that these are—covenants by the lessee (1) to pay rent, (2) to pay tenant's taxes, (3) to keep and deliver up the premises in repair, and (4) to allow the lessor to enter and view the state of repair; and a covenant by the lessor that the lessee shall quietly enjoy the premises (*c*). It follows that, in the absence of precise stipulation, a lessee is not bound to enter into a covenant not to assign the lease without licence from the lessor (*d*), even though the property is a house in London, and the agreement provides that the lease shall contain all usual covenants (*e*); or not to carry on trade on the premises (*f*). But where there is some special local or trade custom, under which certain covenants are always contained in leases, these will be held, with reference to the particular case, to be " usual " covenants, and therefore implied by law. Thus, covenants in restriction of trade appear to be usual in particular cases (*g*), so that there is still plenty of room for litigation under an open or informal agreement.

Other questions sometimes arise on such agreements as to the construction to be put upon concise statements of the covenants which are to be inserted in the lease. As to these, we may mention that it has been decided that a covenant to pay a " net rent " binds a lessee to pay every

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(*c*) 5 Dav. Con. 49n. (*d*) *Church* v. *Brown*, 15 Ves. 259.
(*e*) *Hampshire* v. *Wickens*, 7 Ch. D. 555.
(*f*) *Propert* v. *Parker*, 3 My. & K. 280.
(*g*) See *Bennett* v. *Womack*, 7 B. & C. 627.

kind of rate and tax (*h*), except property tax and tithe rent charge, as does also a covenant to pay rent "free from all outgoings" (*i*).

Agreements for leases by operation of law.

We have next to consider those instruments which amount to agreements for leases by operation of law, and in order to explain this point we must go back to the law as it stood after the passing of the Statute of Frauds (*j*), but before the year 1845.

Statute of Frauds.

The Statute of Frauds enacted (*k*) that all leases, except those not exceeding the term of three years whereupon the rent reserved during the term amounted to two-thirds at least of the full value of the thing demised, should have the force and effect of leases at will only, unless they were put in writing and signed by the parties making or creating the same, or their agents thereunto lawfully authorised in writing. And it will be remembered that, by another section (*l*) of this Act, all agreements for leases must also be in writing. Supposing then that a man were found in possession of land under a written instrument, it might be a question, upon the wording of the instrument, whether he held under a lease, or only under an agreement for a lease, or, in other words, whether he had, or had not, a legal interest in the land. In deciding these questions, the Courts inclined to holding such instruments to be leases. For the general rule was, that where there was an instrument by which it appeared that one party was to give possession and the other to take it, that was a lease, unless it could be collected, from the instrument itself, that it was only an agreement for a lease to be afterwards made (*m*). And on this principle, instruments not containing words of express present demise might be, and often were, held to be leases, provided they contained with sufficient certainty all the

(*h*) See *Bennett* v. *Womack*, 7 B. & C. 627.
(*i*) *Parish* v. *Sleeman*, 1 De G. F. & J. 326.
(*j*) 29 Car. II. c. 3.
(*k*) Ss. 1, 2.
(*l*) S. 4.
(*m*) *Morgan* v. *Bissell*, 3 Taunt, 65, 72.

terms of the lease (*n*); still more if they were followed by some act, such as possession of the premises by the lessee, which showed an intention to pass an immediate interest (*o*).

It being, evidently, undesirable that doubts should be possible as to whether a written document passed a legal interest or not, two Acts were passed, each of which sought to put such questions beyond doubt. Of these the 7 & 8 Vict., c. 76, enacted (*p*) that no lease in writing should be valid, as a lease, unless made by deed, but that every agreement in writing to let land should take effect as an agreement to execute a lease. This Act took no notice of the exception in favour of short leases made by the Statute of Frauds (*q*), and was repealed in the next year by the Real Property Amendment Act (*r*), which enacts (*s*) that a lease required by law to be in writing, made after the 1st day of October, 1845, shall be void at law unless made by deed. This Act, it will be observed, does not touch leases exempted from the operation of the Statute of Frauds. Hence, since the 1st of October, 1845, there can be no doubt, when the term does not come within the exception of the Statute of Frauds, that an instrument which is in writing only, and not by deed, cannot operate as a lease. But it was held that an instrument, void as a lease for a term over three years, might operate to create a tenancy from year to year. For the effect of the statutes which we have been considering is to give to such a lease the effect of a lease at will; and since, ordinarily speaking, payment of rent converts a tenancy at will into a tenancy from year to year, such a lease might, if rent was paid under it, operate to create a tenancy from year to year upon the terms of the agreement so far as they were applicable to such a tenancy (*t*). Moreover such a void lease might be held good in equity as an

7 & 8 Vict. c. 76.

Real Property Amendment Act.

Intended lease for a term may operate to create a yearly tenancy.

(*n*) *Dunk* v. *Hunter*, 5 B. & Ald. 322; *Clayton* v. *Burtenshaw*, 7 Dow. & Ry. 800.
(*o*) *Doe* v. *Ries*, 8 Bing. 178
(*p*) S. 4.
(*q*) 29 Car. II. c. 3.
(*r*) 8 & 9 Vict. c. 106.
(*s*) S. 3.
(*t*) *Doe* v. *Bell*, 5 T. R. 471, and, with notes, 2 Smith L. C. 100; *Clayton* v. *Blakey*, 8 T. R. 3, and, with notes, 2 Smith L. C. 106; Elph. Conv. 298.

agreement for a lease of which specific performance might be granted. Thus in a case in Equity (*u*), there was an instrument relating to a term of more than three years, made after the 1st of October, 1845, and not under seal, which, although it would formerly have been construed as a lease, was so worded as to admit of its being considered an agreement. The lessee entered into possession under it, but, disputes arising between him and the lessor, the latter brought an action of ejectment against him, and he thereupon filed a bill in Chancery to restrain the action, and to compel the grant of a proper lease. It was argued on behalf of the lessor (*v*) that the instrument, being void as a lease, was void altogether, but the Court held that it was admissible as an agreement for a lease: pointing out that the statute only made it "void at law as a lease," and not "void to all intents and purposes."

Effect in equity.

The effect of the Judicature Act, 1873 (*w*), is that, since that statute, a tenant who enters under an agreement holds on the same terms, and the landlord can exercise against the tenant the same rights, as if the lease had actually been granted, provided that the case is one in which the Court would enforce specific performance of the agreement (*x*). But the Act does not extend to enable a landlord to recover rent from an assignee of the agreement, if the assignee has not entered into possession, for, as between the landlord and such assignee, there is neither privity of contract nor privity of estate (*y*).

Judicature Act, 1873.

By the Conveyancing Act, 1892 (*z*), a tenant holding under an agreement for a lease; if he has become entitled to have his lease granted, can obtain the same relief from the

Conveyancing Act, 1892.

(*u*) *Parker* v. *Taswell*, 2 De G. & J. 559, 570.
(*v*) Relying on *Stratton* v. *Pettit*, 16 C. B. 420, now overruled.
(*w*) 36 & 37 Vict. c. 66.
(*x*) Elph. Conv. 289; *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Rickett* v. *Green* [1910] 1 K. B. 253.
(*y*) *Purchase* v. *Lichfield Brewery Co.* [1915] 1 K. B. 184.
(*z*) 55 & 56 Vict. c. 13, s. 5.

Court (under the Conveyancing Act, 1881, section 14 (*a*)), against forfeiture for breach of any condition in the agreement as if he held under an actual lease.

Hence it is sometimes stated that "an agreement for a lease is as good as a lease," but this is not always the case, *e.g.*, if a person, A, agrees to grant a lease of his land to B, and afterwards grants an actual lease by deed to C, C not having at the date of his lease any actual or constructive notice of the agreement between A and B, C's title prevails over that of B, because "where equities are equal, the law prevails."

Leases.

In treating of the second part of our subject, namely, Leases, we will first remind the reader that, under the Statute of Frauds (*b*), a lease (unlike an agreement for a lease) cannot be made by an agent unless the latter be authorised in writing, and that whenever the lease is made by deed the agent must be authorised by deed (*c*). We will next, following our former system in the case of purchase deeds, go through the clauses of a simple lease in its ordinary form.

Ordinary form of a lease.

The component parts of such an instrument are—1st, the Premises; 2nd, the Habendum; 3rd, the Reddendum; 4th, the Covenants; and 5th, the Testimonium.

The Premises.

The Premises begin with the Introductory part, which is in the usual form, and this is followed by the names of the

Parties.

Parties, who should be fully described, as in purchase deeds. It was formerly a matter of great importance that every person intended to take an immediate estate or benefit in a lease should be made a party to it, since otherwise he could not sue on the covenants contained in the lease.

Real Property Amendment Act.

This, however, is now remedied by the Real Property Amendment Act (*d*), which enacts (*e*) that under an

(*a*) 44 & 45 Vict. c. 41, s. 14.
(*b*) 29 Car. II. c. 3, s. 1.
(*c*) *Berkeley* v. *Hardy*, 5 B. & C. 355.
(*d*) 8 & 9 Vict. c. 106.
(*e*) S. 5.

indenture executed after 1st of October, 1845, an immediate estate or interest in any tenement or hereditament, and the benefit of a condition, or covenant, respecting any tenement or hereditament, may be taken, although the taker thereof be not named a party to the said indenture. Ordinary convenience, however, still makes desirable the insertion of the names of all such persons as parties to the lease.

A simple form of lease does not require any Recitals.

Recitals are, generally, unnecessary.

If there are no recitals, the parties are immediately followed by the Operative Part, which begins by setting out the consideration for the lease. The consideration consists usually in the rent to be paid, and the covenants to be observed, by the lessee. But it may be raised by any benefit conferred on the lessor by the lessee, or by anyone on his behalf; and it often consists, besides the rent and covenants, in the payment of a premium, or the execution of repairs or improvements on the property demised. Next come the words of demise by which the term is created. The word "demise" is the best for expressing the fact that the lessor leases the property, and is the only word which need be employed for that purpose. But any words showing a clear intention to lease will have the same effect.

Words of demise.

Next come the Parcels. The general rules to be observed in framing parcels were referred to in our last chapter, and need not therefore be repeated, further than to remind the student of the importance of this clause being accurate, and not containing more, either expressly or by implication, than is intended to pass, whether as part of the property itself or as subsidiary to its enjoyment. These precautions will be especially necessary in drawing leases of property which has never been demised before.

Parcels.

After the parcels come any licences, exceptions or reservations, save that of the rent, which may be agreed upon. These vary with the circumstances of each particular case.

The licences are short statements of privileges conferred upon the tenant outside those arising from the demise of the property.

The habendum.

The Estate Clause was never inserted in leases: so we are now at the end of the premises, and come next to the Habendum. This differs from the habendum in a grant of freehold in that technical words of limitation are not necessary to mark out the extent of the interest granted. The term is sometimes granted " to the lessee, his executors, administrators, and assigns," but these words are unnecessary and are often omitted (*f*). The habendum should name the lessee himself and set out with certainty when the term is to begin and when it is to end. The term may begin at a past, present or future date. If the date inserted in the lease for the commencement of the term is erroneous or the lease has no date, the term will begin from the delivery of the deed. If a future day is stated for the commencement of the term, the grantee, until that day arrives and he has entered, has merely an *interesse termini*, *i.e.*, he has not an estate in the land and therefore cannot maintain an action for trespass. But he can grant his interest to another, and if he dies before entry, his executors or administrators can enter. Such a reversionary lease creates a vested and not a contingent interest. There is no need, therefore, to restrict the time of commencement as to perpetuities (*g*).

The reddendum.

Then follows the Reddendum, which takes up the story at the point where it was left by the habendum, and states the rent which the lessee is (to use the common form) to " yield and pay," and the days on which it is to be paid. Quarterly payments are the most usual, and the reddendum should fix them with reference to precisely named days of certain months; the day on which the first payment is to be made being also expressly stated. The reddendum should

(*f*) Elph. Conv. 324.
(*g*) Elph. Conv. 294; *Mann, Crossman and Paulin, Ltd.* v. *Registrar of Land Registry* [1918] 1 Ch. 203.

not state to whom the rent is to be paid, for if rent is reserved generally the law will always carry it to the owner of the reversion, whoever he may be, whilst an incomplete or mistaken reservation may give rise to difficulties. Rent cannot be reserved to a stranger. The lease should contain also a stipulation, in the event of the term being put an end to by the lessor's re-entry, for payment by the lessee of a proportionate part of the rent for the fraction of the current quarter up to the day of such re-entry.

The covenants.

We next come to the Covenants, beginning with those entered into by the lessee with the lessor.

Lessee's covenants.

These covenants are (1) to pay rent; (2) to pay rates and taxes; (3) to repair; (4) to permit the lessor to enter and inspect the state of repair; (5) to repair upon notice being given of want of repair; (6) to insure; (7) not to use the premises otherwise than as a private dwelling-house, without licence; (8) not to assign the premises, without licence; and (9) to deliver up the premises in good repair at the end of the term.

Covenant to pay rent.

A covenant to pay a fair rent is implied on every demise, and the reservation of rent in the reddendum raises an implied covenant to pay the particular rent reserved, but an additional express covenant to pay the rent, on the days and in the manner previously mentioned in the lease, is always inserted in order to enable the lessor to maintain an action of covenant for non-payment. By the insertion of the express covenant the lessor obtains a personal remedy against the lessee even after he has assigned the lease (*h*).

Covenant to pay taxes.

The object of the covenant for payment of rates and taxes is to throw upon the lessee certain burdens which would, in the absence of agreement, have to be borne by the lessor. These are the payment of land tax, sewers rates, and also of all assessments made in respect of permanent improvements done by order of a local authority, which assess-

(*h*) Elph. Conv. 328.

ments are primarily payable, under the various Acts authorising the improvements, by the owners of the adjoining premises. The ordinary wording of this covenant is, that the lessee shall pay all future as well as existing taxes, rates, assessments, impositions, and outgoings, now or hereafter during the said term to be or become charged or imposed upon the premises or payable by either the owner or occupier in respect of the premises except landlord's property tax and tithe rent charge. The obligation to pay property tax cannot, even by contract, be thrown on the tenant, but, if he pays it, he can deduct it from the next rent (*i*). The obligation to pay tithe rent charge (*j*), and extraordinary tithe rent-charge (*k*) cannot, even by contract, be thrown on the tenant. The proper wording of the covenant is a matter of importance, since it will be construed strictly against the lessor. It should include future taxes, &c., because, although a general covenant to pay taxes will probably include all future taxes of the same kind as those covenanted to be paid, it will not embrace any of a different nature. It is also necessary to specify "assessments and outgoings," for although a covenant to pay taxes generally will include all parliamentary taxes (other than those specified above), it will not embrace any other impositions, although they may be ordinarily spoken of as taxes, such, for instance, as a sewers rate (*l*), and for these the word "assessments" is required. The covenant must also extend to "outgoings," for it has been held that a covenant to pay all assessments will not throw on the tenant the cost of abating a nuisance (*m*), or of paving under section 150 of the Public Health Act, 1875 (*n*).

Covenant to repair.

The next covenant is, that the lessee will, during the term, and without being required so to do, repair, maintain,

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(*i*) 5 & 6 Vict. c. 35, s. 73; Income Tax Act, 1918 (7 & 8 Geo. 5, c. 40).
(*j*) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 1.
(*k*) Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 7.
(*l*) *Palmer* v. *Earith*, 14 Mee. & W. 428.
(*m*) *Lyon* v. *Greenhow*, 8 Times L. R. 457.
(*n*) *Baylis* v. *Jiggens* [1898] 2 Q. B. 315; *Farlow* v. *Stevenson* [1900] 1 Ch. 128.

and keep the premises in good and substantial repair; and this is followed up by specifying such particular kinds of repair as are applicable to the property demised.

Effect of the covenant.

A covenant to repair does not mean that an old building is to be restored in a renewed form at the end of the term, thus making it of greater value than at the commencement of the term. It only binds the lessee to take care, by keeping the premises as nearly as possible in the same condition as when they were demised, that they do not suffer more than the operation of time and nature would effect (*o*). But a covenant to keep the premises in repair binds the lessee, if they are out of repair, to put them in repair, and he cannot therefore leave them in bad repair because they were in that state when he took them (*p*). The tenant must leave the house in such repair as would make it reasonably fit for occupation of a reasonably minded tenant of the class likely to take the house. The tenant need not do decorative repairs, nor repaper or paint, unless such repairs would be reasonably expected by an incoming tenant of the class likely to take the house (*q*). The measure of damages for breach of covenant to repair, if the action is brought during the continuance of the lease, is the extent of the damage to the reversion (*e.g.*, the freehold might be sold at a lower price because the house is out of repair), not the sum required to repair (*r*). But if the action is brought after the lease has expired, the measure of damages is what it would cost to put the premises in proper repair, and the landlord can claim this sum even though he does not intend to repair the house (*s*). This covenant moreover binds the lessee to rebuild the premises if they are burnt down or thrown down by enemies (*t*), nor is this liability affected by the fact of the

(*o*) *Gutteridge* v. *Munyard*, 7 C. & P. 129; *Lister* v. *Lane* [1893] 2 Q. B. 212.
(*p*) *Payne* v. *Hayne*, 16 Mee. & W. 541.
(*q*) *Proudfoot* v. *Hart*, 25 Q. B. D. 42.
(*r*) *Henderson* v. *Thorn* [1893] 2 Q. B. 164; *Conquest* v. *Ebbetts* [1896] A. C. 490.
(*s*) *Joyner* v. *Weeks* [1891] 2 Q. B. 31.
(*t*) *Bullock* v. *Dommit*, 6 T. R. 650; *Digby* v. *Atkinson*, 4 Camp. 275; *Stephens* v. *Junior Army and Navy Stores, Ltd.* [1914] 2 Ch. 516.

lessor's having insured them and having received the insurance money (*u*).

Covenant to permit the lessor to enter and view the state of repair.

The general covenant to repair without notice is followed by another, by which the lessee undertakes to permit the lessor, at all reasonable times, to enter upon the premises in order to view their condition; a thing which the lessor could not do without a stipulation to that effect, except in cases falling within the Housing and Town Planning Act, 1909, where houses are let at certain low rentals (*v*). It is also provided that the lessor may give notice in writing of all defects and wants of repair on the premises, and the lessee covenants that he will, within a specified time (generally three months), make good all defects of which notice has been given. The object of this covenant is to prevent any question arising under the general covenant to repair, as to what repairs are necessary, or whether the lessee is using due expedition in repairing, by enabling the lessor to specify the repairs which he requires to be done, and by fixing a time within which they are to be finished.

Covenant to repair on notice.

Covenant to insure.

This covenant is followed by one to the effect that the lessee will insure the premises in the joint names of the lessor and of the lessee; that he will, if required, produce the insurance policy and the various receipts for premiums, and will, in case of fire, lay out the insurance moneys in rebuilding the premises. By this means the lessor obtains a security that the premises will be rebuilt which is additional to, and presumably more effectual than, that which he has under the lessee's covenant to repair; and its insertion is therefore a matter of common form.

Covenant not to use the premises for the purpose of any trade.

Where the premises, or part of them, consist of a dwelling-house, it is usual to insert a covenant that the lessee will not use the house for purposes of trade or business, or otherwise than as a private dwelling-house, without the licence in

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(*u*) *Leeds* v. *Cheetham*, 1 Sim. 146.
(*v*) *Barker* v. *Barker*, 3 C. & P. 557; 9 Edw. 7, c. 44, ss. 14, 15.

writing of the lessor, his heirs or assigns. The general restriction against carrying on trade appears to be preferable to a form saying that particular kinds of business are not to be carried on without licence, or one restraining "offensive" trades only. For such clauses often give rise to disputes, whereas the general prohibition allows the lessor to exercise his judgment upon each application made to him, and in that case his rights under the covenant will not be limited by any consideration as to the nature of the trade or business proposed to be carried on (*w*). It may be added that the word "business" includes keeping a school (*x*).

Covenant not to assign or underlet.

A covenant often inserted in leases of dwelling-houses and other premises, when the personal character of the tenant is a matter of importance, is a covenant against assignment or sub-letting the premises or any part thereof without the consent in writing of the lessor. The covenant, if intended to run with the land, should extend to the assigns of the lessee, so as to mark the intention, although in the absence of contrary intention it will be construed as running with the land whether assigns are mentioned or not (*y*). The Court cannot relieve the lessee against forfeiture for breach of this covenant (*z*), but can relieve an under-lessee (*a*).

As to under-letting.

The covenant against assignment should, if intended to prohibit under-letting, be expressly worded to that effect, for a covenant merely not to assign does not prevent the lessee from making an under-lease of part of the term (*b*); although an under-lease of the whole term amounts to an assignment (*c*). A covenant not to assign is not broken by the deposit of a lease by way of security for money lent, since this is not a parting with the legal interest (*d*), nor by a

(*w*) *Macher* v. *Foundling Hospital*, 1 Ves. & B. 186.
(*x*) *Doe* v. *Keeling*, 1 Mau. & Sel. 95, 100.
(*y*) Elph. Conv. 340-1; *Goldstein* v. *Sandars* [1915] 1 Ch. 549; *Re Robert Stephenson & Co.* [1915] 1 Ch. 802.
(*z*) *Eastern Telegraph Co.* v. *Dent* [1899] 1 Q. B. 564.
(*a*) *Imray* v. *Oakshette* [1897] 2 Q. B. 218.
(*b*) *Crusoe* v. *Bugby*, 3 Wil. 234; *Kinnersley* v. *Orpe*, 1 Doug. 56.
(*c*) *Beardman* v. *Wilson*, L. R. 4 C. P. 57.
(*d*) *Doe* v. *Hogg*, 4 Dow. & Ry. 226.

declaration of trust in favour of creditors (*e*), nor does the covenant apply to an involuntary alienation by operation of law. Thus no breach occurs on the lease being taken in execution (*f*), or on the bankruptcy of the lessee (*g*), and the trustee in bankruptcy can sell without licence (*h*). A covenant not to sublet is not broken if the lessee, having sublet with the consent of the lessor, afterwards consents to a further sub-letting by his lessee (*i*). Unless there is an express condition to the contrary, a provision against payment of a fine for the licence to assign is implied by the Conveyancing Act, 1892 (*j*). But this enactment does not make the payment of a fine illegal (*k*), or prevent the parties to the lease from agreeing that a fine shall be paid for the granting of the licence, and, accordingly, if a fine be paid by the lessee, not under protest, he cannot recover it back. If, however, the lessor refuses to give his consent except on payment of a fine, the lessee may disregard the covenant and assign without consent (*l*).

Payment of fine for licence to assign.

Consent not to be unreasonably withheld.

Sometimes the covenant not to assign or underlet is qualified by the words "such consent not to be arbitrarily withheld" or "unreasonably withheld." These words mean that the consent shall not be unfairly withheld. The lessee cannot recover damages against the lessor for an arbitrary refusal or compel him to give consent, but, if the lessor unreasonably refuses his consent, the lessee can assign without it. But the consent of the lessor must first be asked for (*m*). The lessor is not bound to give a reason for the refusal to grant a licence; but if he does give a reason and offers to grant a licence subject to an unreasonable condition, the Court will make a declaration that the lessee

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(*e*) *Gentle* v. *Faulkner* [1900] 2 Q. B. 267.
(*f*) *Doe* v. *Carter*, 8 T. R. 300.
(*g*) *Re Riggs* [1901] 2 K. B. 16.
(*h*) *Doe* v. *Bevan*, 3 M. & S. 353.
(*i*) *Mackusick* v. *Carmichael* [1917] 2 K. B. 58.
(*j*) 55 & 56 Vict. c. 13, s. 3.
(*k*) *Andrew* v. *Bridgman* [1908] 1 K. B. 596.
(*l*) Elph. Conv. 341; *West* v. *Gwynne* [1911] 2 Ch. 1.
(*m*) *Barrow* v. *Isaacs* [1891] 1 Q. B. 417.

is entitled to assign without any further consent of the lessor (*n*).

The lessee's covenants sometimes terminate by a general undertaking on his part that he will, at the end of the term, deliver up the premises in good repair, and in such a condition as shall be consistent with the due performance of his covenants. Covenant to deliver up in good repair.

These covenants are followed by a very important clause, which is known as the Proviso for Re-entry. This is to the effect that whenever any part of the rent shall have been in arrear for (generally) three weeks, whether the same shall have been legally demanded or not, or whenever the lessee shall commit a breach of any of his covenants, the lessor may re-enter upon the premises, and that thereupon the term granted shall absolutely determine. Proviso for re-entry.

The proviso should particularly state that the re-entry may be made whether the rent has been legally demanded or not, for this wording enables the lessor to re-enter for non-payment of rent without any demand for rent (*o*), and it also avoids the common-law niceties which were formerly requisite in making a re-entry for non-payment, and which still apply (*p*), in the absence of such a stipulation, unless there is a half-year's rent due, and no sufficient distress can be found upon the premises (*q*).

As regards forfeiture for non-payment of rent, the Court of Equity always gave relief to the tenant on his paying the rent due with interest and costs: and now, by the Common Law Procedure Act, 1852 (*r*), and the Common Law

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(*n*) High Cons. 343-4; *Eastern Telegraph Co. v. Dent* [1899] 1 Q. B. 835; *Young v. Ashley Gardens Properties, Ltd.* [1903] 2 Ch. 112; *West v. Gwynne* [1911] 2 Ch. 1.

(*o*) *Doe v. Masters*, 2 B. & C. 490.

(*p*) 2 Platt on Leases, 341.

(*q*) See 15 & 16 Vict. c. 76, s. 210; *Thomas v. Lulham* [1895] 2 Q. B. 400.

(*r*) 15 & 16 Vict. c. 76, ss. 210, 212.

Procedure Act, 1860 (*s*), statutory relief is given to the tenant against forfeiture, but the time within which the tenant can apply for relief is limited to six months after ejectment. It has been held that relief may be granted under the statutes even though the landlord has acquired peaceable possession without action (*t*). As to forfeiture for breach of any other covenant, the Conveyancing Act, 1881, provides (*u*) that with the exception of forfeiture for breach of covenants not to assign or underlet or part with the land, and (in mining leases) of covenants to permit the lessor to inspect the books and accounts of the mine and also the mine itself, and of conditions for the forfeiture of the lease on the bankruptcy of the lessee, or on his interest in the land being taken in execution, no forfeiture of a lease or condition of re-entry can be enforced unless and until the lessor has served on the lessee a notice requiring him to remedy the breach and make compensation in money for the same (*v*), and the lessee has failed to comply, within a reasonable time, with such notice. And if the lessor is proceeding to enforce the right of forfeiture or of re-entry by any means, the lessee may apply to the High Court of Justice, which has full discretion to grant or refuse him relief, and in the former case upon any terms which it thinks fit. The Act does not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent (as to which see above), but, so far as it applies, it is to have effect notwithstanding any stipulation to the contrary. For the purpose of these provisions a lease includes an original or derivative under-lease, and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, or assigns of an under-lessee, whilst a lessor includes

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(*s*) 23 & 24 Vict. c. 126, s. 1.
(*t*) *Howard* v. *Fanshawe* [1895] 2 Ch. 581.
(*u*) 44 & 45 Vict. c. 41, s. 14.
(*v*) *i.e.*, if the landlord requires compensation. A notice served under this section is not insufficient because no compensation is demanded (*Lock* v. *Pearce* [1893] 2 Ch. 271). See also, as to form of the notice, *Fox* v. *Jolly* [1916] 1 A. C. 1. The landlord need only state particulars of the breaches of the covenants and call upon the lessor to remedy them; he need not specify the means.

an original or derivative under-lessor, with their heirs and assigns respectively.

The Act of 1881 gave no relief in case of a condition for forfeiture on bankruptcy of the lessee or the taking of the lease in execution, but the Conveyancing Act, 1892, now provides (*w*) that forfeiture under such conditions shall not take place till one year after the bankruptcy or execution, and shall take place then only if the lease has not been sold, but the enactment is not to apply to leases of (i) agricultural or pastoral land; (ii) mines or minerals; (iii) public-houses or beershops; (iv) furnished houses; (v) any property when the personal qualifications of the tenant are of importance for the preservation of the value or character of the property or on the ground of neighbourhood to the lessor or to any person holding under him (*x*). The Conveyancing Act, 1892 (*y*) further extends the provisions of the Conveyancing Act, 1881, as to relief against forfeiture to under-lessees of lessees who have committed breach of covenant. When the lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture in respect of a head lease, the Court has power, on the application of an under-lessee, to vest in him the property comprised in the lease for the whole term of the head lease, or any less term, upon such conditions as to rent, etc., as the Court thinks fit, but the under-lessee cannot require a lease to be granted to him for any longer term than he had under the sub-lease. Under this provision the under-lessee may sometimes obtain relief when the lessee himself could not, *e.g.*, where the head lease was forfeited for breach of a covenant against assignment (*z*). In one case (*a*), where the lease had been forfeited for breaches by the lessee of the covenant to repair, the under-lessee was held to be entitled to relief although he had committed breaches of a similar covenant

(*w*) 55 & 56 Vict. c. 13, s. 2.
(*x*) Section 2, subs. (3).
(*y*) 55 & 56 Vict. c. 13, s. 4.
(*z*) *Imray* v. *Oakshette* [1897] 2 Q. B. 218.
(*a*) *Hurd* v. *Whaley* [1918] 1 K. B. 448.

in the under-lease. Under the Conveyancing Act, 1881, if a tenant under an agreement for a lease broke the terms of the agreement, he could not obtain relief from forfeiture unless the agreement were such as the Court would specifically enforce (*b*), but the Conveyancing Act, 1892 (*c*), now provides that relief against forfeiture can be granted to a tenant holding under an agreement for a lease, or for an under-lease, when he has become entitled to have his lease, or under-lease, granted.

Lessor's covenant for quiet enjoyment.

The proviso for re-entry is followed by a covenant on the part of the lessor that the lessee and his representatives shall, provided that they pay the rent and observe the covenants mentioned in the lease, peaceably enjoy the premises without any interruption by the lessor, or any person claiming under him. It will be noticed that this is not an absolute covenant for quiet enjoyment. It is to be observed that the covenant for quiet enjoyment whether in a purchase deed or in a lease, does not enlarge or increase the rights granted by the previous part of the deed. Its only effect is that an additional remedy, namely, an action for damages, is given if the lessee cannot get, or is deprived of, anything which has been previously professed to be granted or demised. It seems that, in the absence of an express covenant for quiet enjoyment, a covenant for quiet enjoyment may be implied from any words sufficient to constitute the relationship of landlord and tenant (*d*). The word "demise" is sufficient for the purpose (*e*); and the word "let" has also been held to be sufficient (*f*). The implied covenant is a qualified covenant, extending only to the acts of the lessor and those claiming under him (although at one time it was thought that the word "demise," in the absence of an express covenant for quiet enjoyment, implied

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(*b*) *Swain* v. *Ayres and Luck*, 21 Q. B. D. 289.
(*c*) 55 & 56 Vict. c. 13, s. 5.
(*d*) *Budd-Scott* v. *Daniell* [1902] 2 K. B. 351; but see *Baynes* v. *Lloyd* [1895] 2 Q. B. 610, and *Jones* v. *Lavington* [1903] 1 K. B. 253.
(*e*) *Baynes* v. *Lloyd* [1895] 2 Q. B. 610.
(*f*) *Budd-Scott* v. *Daniell* [1902] 2 K. B. 351; *Markham* v. *Paget* [1908] 1 Ch. 697.

an unqualified covenant for quiet enjoyment), and is limited to breaches occurring during the continuance of the lessor's interest (*g*). The advantage of the express covenant (which, if inserted, excludes any implied covenant (*h*), is that the lessor's liability does not, as where the covenant is implied, cease with his interest. Therefore if a tenant for life grants a lease, and gives an express covenant for quiet enjoyment, and dies before the lease has expired, and the lessee is afterwards disturbed by someone claiming under him, the representatives of the lessor are liable on the covenant (*i*). A covenant for quiet enjoyment may be safely entered into by a person who has no title to the property comprised in the lease, for if the true owner claiming by title paramount to the lessor disturbs the tenant, the disturbance is not the act of the lessor or any person "claiming under" him (*j*).

The testimonium.

The deed concludes with the ordinary Testimonium, which should, if there is no counterpart, be signed by both the lessor and the lessee; but it is more usual to have a counterpart, in which case the lease is signed by the lessor, and the counterpart by the lessee. Both instruments should be properly attested.

Increase of Rent (Restrictions) Act.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, of 1920 (*k*) the power of a landlord to give the tenant notice to quit or to increase the rent (except to the extent permitted by the Act) is restricted in the case of dwelling-houses and unfurnished business premises when either the "standard rent" or rateable value does not exceed £105 in London and £78 elsewhere in England. The Act is to remain in force until 24th June, 1923, except as regards business premises, the provisions as to which continue until the 24th June, 1921. The Act does not apply to dwelling houses or business premises erected after, or in course of erection on, April 2, 1919.

(*g*) *Baynes* v. *Lloyd* [1895] 2 Q. B. 610.
(*h*) *Malzy* v. *Eichholz* [1916] 2 K. B. 308.
(*i*) Elph. Conv. 348.
(*j*) Elph. Conv. 347.
(*k*) 10 & 11 Geo. 5, c. 17.

CHAPTER V.

OF MORTGAGE DEEDS (*l*).

We come next to the consideration of the ordinary form of a mortgage deed of land. A legal mortgage consists essentially of a conveyance of the mortgaged property to the mortgagee, with a proviso for its reconveyance when the debt secured by it is paid off. It contains, in addition, various other clauses which are necessary to give completeness to the transaction. Where the subject of the mortgage is a freehold estate in land, the conveyance, ordinarily, takes the form of an absolute grant of it, subject to the proviso for redemption. On a mortgage of leaseholds, it is open to the mortgagee to take either an assignment of the whole term for which the property is held by the mortgagor or else a lease for a period a day short of the whole term. A question as to which plan is the better can only be answered by reference to the circumstances of each case. Generally speaking, if the covenants in the lease are not onerous, the mortgagee had better take an assignment of the whole term, as he thus gets the whole legal interest in it vested in himself (which is an advantage if he has to sell the property), and also obviates any risk of the lease being forfeited by the mortgagor's committing some breach of covenant in the lease involving forfeiture. On the other hand, the mortgagee, if he takes an assignment of the whole term, and even though he never enters into possession of the property, becomes liable to the lessor on all those covenants contained in the lease which run with the land. By the Conveyancing Act, 1881, s. 14, as extended by the Conveyancing Act, 1892, s. 4, if the mortgagor commits a breach of

Form of mortgage.

Freeholds.

Leaseholds.

(*l*) See Precedents XXIV., XXXV.

covenant, the under-lessee mortgagee can now apply to the Court for relief, but such relief is only given him on condition that the lease is vested in him for a term not exceeding that of his under-lease and subject to such conditions as to rent and performance of covenants as the Court thinks fit. If the mortgagor becomes bankrupt, and the amount due for rent and on subsequent mortgages is such as to render the lease onerous to the mortgagor, his trustee in bankruptcy may, under the Bankruptcy Act, 1914, s. 54, if the mortgage was made by sub-lease but not if it was made by assignment, disclaim the mortgagor's interest in the lease. The Court may, on the application of any person interested in the lease, make an order vesting it in him upon the terms of making him subject to the same liabilities and obligations as the bankrupt was subject to under the lease at the date of the bankruptcy petition, or, if the Court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to him at that date, and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order. Hence, if the mortgage is made by assignment, the mortgagee's interest is not affected by the bankruptcy of the mortgagor; but, if it is made by sub-lease, he may have to choose between having the lease vested in him and losing his security (*m*).

In order to avoid the risk of the forfeiture of the lease by the disclaimer of the trustee in bankruptcy of the mortgagor, when the lease is made by sub-lease, the following clauses may be added (i) a declaration of trust by the mortgagor of the reversion for the benefit of the mortgagee and those claiming under him; (ii) a power of attorney authorising the mortgagee to assign the reversion to himself or any other person, subject to the equity of redemption, if any then existing; (iii) power to the mortgagee to appoint a new trustee of the reversion as if the mortgagor were dead (*n*). The second clause enables the mortgagee, at any time before the disclaimer by the mortgagor's trustee in bankruptcy, to

(*m*) Elph. Conv. 234.

(*n*) Elph. Conv. 235.

vest the reversion in himself; and the third clause enables the mortgagee, at any time before the disclaimer is made, to appoint a nominee of his own as trustee of the reversion and by means of a vesting declaration to vest the reversion in him without the concurrence of the mortgagor (*o*). Thus the mortgagee can prevent the disclaimer from affecting his interest in the property.

Copyholds.

Since copyholds do not pass by deed, a mortgage of them takes, in the first place, the form of a covenant by the mortgagor that he will, immediately after the execution of the mortgage deed, surrender them to the lord of the manor to the use of the mortgagee. In this covenant are embodied the usual mortgage clauses as to payment of principal and interest. The covenant is a deed of conveyance (if it precedes the actual surrender), and therefore under the Conveyancing Act, 1881, covenants for title are implied by the deed and the mortgagee has the implied power of sale given by the Conveyancing Act, 1881, to all mortgagees whose mortgage is by deed of conveyance. As a conditional surrender is not a deed, the covenants for title cannot be implied and no power of sale arises. It is important, therefore, that the covenant should precede the conditional surrender, because, if the mortgage deed follows the surrender, it is not "a conveyance," so that the covenants for title cannot be implied and no power of sale arises. In such a case the deed should contain covenants for payment, an express power of sale, and express covenants for title (*p*). The covenant to surrender is followed by the formal surrender, which is duly entered on the manor rolls, but expressed to be subject to a condition that on payment by the mortgagor, on a specified date, of all sums secured by his covenants in the mortgage deed (and to which we will refer presently) the surrender shall be void and of no effect. The mortgagee has not a legal title to the copyholds unless they are thus surrendered to him; and cannot, therefore, safely part with his money until the

(*o*) *London and County Bank* v. *Goddard* [1897] 1 Ch. 642.
(*p*) Elph. Conv. 231-2.

surrender is made, since, up to that time, he is liable to be postponed to any subsequent purchaser for value who has obtained a surrender without notice of the earlier mortgage (*q*). This conditional surrender, as it is called, leaves the mortgagor tenant of the manor (*r*), but prevents him from dealing with the property to the prejudice of the mortgagee, whilst it has, at the same time, the advantage of freeing the mortgagee from any liability to the lord of the manor, who, having the tenancy "full" already, has no further claims in respect of it. Generally the mortgagee is not admitted on the conditional surrender, because a fine to the lord of the manor would be payable on his admittance and also on the surrender to the mortgagor and his admittance thereon when the debt is paid off. The mortgagee incurs no risk by not being admitted at the time of the mortgage, because, on his admittance at any later date, his title relates back to the date of the conditional surrender and is therefore good against any person who has advanced money on the same security to the copyholder since the date of the surrender. We may add here that if the mortgage is paid off, an entry of its satisfaction, made on the manor rolls, is sufficient to restore the mortgagor to his original position if the mortgagee has not been admitted.

The mortgage deed.

Having premised thus much, we will, pursuing our system in other cases, go through the various clauses of an ordinary mortgage deed of freeholds in fee-simple, adverting, when necessary, to the differences between such clauses and those of a mortgage deed which deals with leaseholds, or with copyholds.

Introductory part.

Recitals.

The introductory part of the deed conforms to the rules which govern the corresponding portion of a purchase deed, as do also the recitals, except that the last introductory recital consists of a statement of the agreement for a loan, subject to its repayment being secured in the manner to be described in the deed.

(*q*) *Oxwith* v. *Plummer*, 2 Ver. 636
(*r*) *Doe* v. *Wroot*, 5 East, 132.

First witnessing part.

Next comes the first Witnessing Part. This consists more generally, though by no means universally, of a covenant by the mortgagor which, referring to, and acknowledging the receipt of, the sum lent, promises that in consideration thereof the mortgagor or his representatives will, on a specified day (usually six calendar months from the date of the deed), pay to the mortgagee the same sum, with interest in the meantime at a given rate per cent. This covenant makes the mortgagee a specialty creditor of the mortgagor: a position which he would not hold otherwise, since the implied contract for repayment arising out of the loan raises a simple contract debt only. There is, therefore, an advantage in inserting the covenant, because a simple contract debt is barred by lapse of six years without payment of interest or acknowledgment in writing of the debt by the mortgagor, whereas, if a mortgage deed contains a covenant to pay the debt, the claim on the covenant is not barred until twelve years after the time when the right first accrued, or from the time of the last receipt of some principal or interest, or an acknowledgment in writing of the mortgagee's right thereto by the mortgagor or some other person interested in the equity of redemption (*s*).

Covenant for payment of interest.

The covenant to repay the principal debt is followed by a covenant by the mortgagor that if the principal sum lent, or any part of it, shall remain unpaid after the day fixed for payment he will, so long as it remains unpaid, pay interest on it at a specified rate. The covenant should also name the days on which such interest is to be paid; these being usually arranged so as to secure half-yearly payments. Here, too, should be inserted any proviso which may have been agreed upon for reduction of the rate of interest, on punctual payment of the sums secured by the last-mentioned covenant. The covenant for payment of interest at a higher rate, followed by a proviso for reducing that rate, is a circuitous

(*s*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; *Sutton* v. *Sutton*, 22 Ch. D. 511.

method of imposing a penalty on the mortgagor if he does not pay his interest regularly. This object cannot be effected directly, owing to the somewhat unsatisfactory doctrine of equity which treats a proviso that the rate of interest shall be increased in default of punctual payment as a penalty to be relieved against. Thus, in an early case (*t*), a proviso raising the rate of interest from £5 per cent. to £5 10s. per cent. per annum, if the interest were not paid within two months from the time fixed for payment, was set aside, although the interest was greatly in arrear. And the Court decreed payment at the lower rate without allowing the mortgagee anything on account of the delay in payment, notwithstanding that the decision was founded upon the principle that such a proviso was a penalty to be relieved against, and that such relief is, ordinarily, given only to a person making full recompense in respect of the act, or neglect, for which the penalty was imposed. But both in that and in other cases (*u*) the Court has approved of covenants for payment of interest at a certain rate which is to be reduced if the interest be paid punctually, although, as observed by the editor of Vernon's Reports (*v*), the agreement of the parties seems to be the same in either case, and whether interest is to be reduced on compliance with the times of payment, or advanced in default thereof, seems to be only a difference in expressing one and the same thing. "Punctual payment" means payment on the exact date fixed for payment (*w*). Moreover the provision for reduction of interest does not apply when the mortgagee takes possession (*x*).

Capitalisation of interest.

In some of the older cases it was held that a proviso in a mortgage deed that any interest not paid within a specified time should be treated as principal and carry interest could not be enforced; the rule at that time being that no agree-

(*t*) *Strode* v. *Parker*, 2 Ver. 316; and see *Hailes* v. *Wise*, 2 Ver. 259: *Nicholls* v. *Maynard*, 3 Atk. 519.

(*u*) *Stanhope* v. *Manners*, 2 Eden, 197: *Wayne* v. *Lewis*, 25 L. T. 284; and see *Herbert* v. *Salisbury Ry. Co.*, L. R. 2 Eq. 221, 224.

(*v*) 2 Ver. 317.

(*w*) *Hanley Theatre of Varieties* v. *Broadbent* [1898] 1 Ch. 348.

(*x*) *Union Bank* v. *Ingram*, 16 Ch. D. 53: *Bright* v. *Campbell*, 41 Ch. D. 388.

ment entered into at the time of the mortgage could turn future interest into principal, but that to make interest into principal it was necessary that interest should be first due, and then an agreement concerning it might turn it into principal (*y*). This rule, however, was founded upon the then existing laws which prevented interest from being charged beyond certain rates, and since these laws have been repealed there is no objection to interest in arrear carrying interest if the parties chose to make a bargain to that effect (*z*). But a proviso for capitalisation of interest if in arrear for, say, twenty-one days, does not take effect if the mortgagee is in possession and receives sufficient rent to pay his interest before the twenty-one days have expired (*a*).

Declaration on loan by trustees.

Where the mortgage money was advanced by trustees it was formerly necessary to insert at this point a declaration that it belonged to them on a joint account in equity as well as at law: and that, consequently, the survivor should remain entitled in equity, as well as at law, to the sums secured by the mortgage deed. The reason for this was that the courts of equity assumed, in the absence of a distinct statement to the contrary, that where two or more people lent money jointly, it could not have been their intention that the right to it should belong exclusively to the survivor, but that, although they took a joint security, each meant to lend his own money, and to take back his own (*b*). Therefore, on the death of one, the survivor could not, on payment off of the mortgage, give a discharge of the mortgage debt without the concurrence of the personal representatives of the deceased trustee. This could be avoided by stating that the mortgagees were trustees of the mortgage money. But it is not desirable to state in the mortgage deed that the money lent is trust money, for that would have the disadvantage of affecting every person dealing with the property with notice of the trust and would incorporate the title-deeds relating

(*y*) *Ossulton* v. *Yarmouth*, Salk. 448.
(*z*) *Clarkson* v. *Henderson*, 14 Ch. D. 348.
(*a*) *Wrigley* v. *Gill* [1906] 1 Ch. 165.
(*b*) *Per Sir R. Arden*, M.R. 3 Ves. 631.

to the trust into the title of the mortgagor (*c*). But the Conveyancing Act, 1881, enacted (*d*) that where the mortgage money is expressed to be advanced by or owing to more persons than one out of money belonging to them on a joint account, or where the mortgage is made to them jointly and not in shares, the mortgage money for the time being due to those persons on the mortgage shall be deemed to be and remain money belonging to those persons on a joint account, as between them and the mortgagor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money for the time being due, notwithstanding any notice to the payer of a severance of the joint account. In mortgages to trustees and others advancing money on a joint account the usual practice, since the Conveyancing Act, 1881, is to state in the deed that the mortgagees advance the money "out of moneys belonging to them on a joint account"; but these words, though usual, are not strictly necessary, the fact that the mortgage is made to more persons than one jointly being sufficient to render the provisions of the Conveyancing Act, 1881, section 61 applicable.

Contributory mortgage.

It may happen that several persons join in lending a sum of money which belongs to them, not on a joint account but in distinct shares; as where two or more persons each advance money of their own on the security of a single mortgage. In this case the intending lenders may nominate some persons as trustees, who appear by the mortgage deed to advance the money as if it belonged to them on a joint account, the contributories to the loan not being parties; and then the trustees declare by a separate deed that they hold the mortgage money in trust for the persons actually advancing it. This involves some risk of the trustees' fraudulently misappropriating the mortgage money when it is paid off. Therefore another course sometimes adopted is to make the contributories parties, and convey the land to them as joint tenants,

(*c*) *Re Blaiberg and Abraham's Contract* [1899] 2 Ch. 341.
(*d*) 44 & 45 Vict. c. 41, s. 61.

inserting in the mortgage deed distinct covenants with each of them for payment of the money advanced by him (*e*).

Second witnessing part.

Then follows the second Witnessing Part. This corresponds to the operative part of the purchase deed, and contains the words which convey the mortgaged property, by grant or by demise or assignment, according as it is freehold or leasehold, to the mortgagee. If the property is copyhold, the words of conveyance find a substitute in the covenant for surrender previously mentioned. The mortgagor, where the deed is made after the Conveyancing Act, 1881, came into operation, is expressed to convey as beneficial owner; with the result that covenants for title by him are implied which are nearly the same as those implied on a conveyance on a sale by a beneficial owner, but differ in one respect, namely, that whereas the implied covenants by an ordinary vendor only relate to the acts of himself, and of persons through whom he claims otherwise than by purchase, and of those who claim under him, a mortgagor's covenants contain no such limitation, but are without any qualification whatever (*f*). The conveyance, however, whatever its form may be, is made subject, in the case of freeholds or leaseholds, to a proviso for redemption on repayment of the sum advanced; and in the case of copyholds, to a condition for making void the surrender, corresponding with the proviso for redemption.

Parcels.

Habendum.

After the operative part come the Parcels, which are described in the usual way. These are followed by the Habendum, which limits the mortgagee's estate, according to the nature of the mortgaged premises, to the mortgagee and his heirs or in fee-simple, if it is freehold, and to the mortgagee without words of limitation if it is leasehold, and subject to the proviso for redemption which immediately follows.

Proviso for redemption.

The Proviso for Redemption in modern practice takes the form of an agreement that if the mortgagor or those claim-

(*e*) Elph. Conv. 203-4. (*f*) 44 & 45 Vict. c. 41, s. 7.

ing under him shall, on the day already fixed by his covenant for payment of the principal and current interest, pay those sums to the mortgagee, his executors, administrators, or assigns, then the mortgagee, his executors, administrators, or assigns, will, upon the request and at the cost of the mortgagor, his heirs, executors, administrators, or assigns, re-convey the property to the mortgagor, his heirs or assigns. This covenant, it will be noticed, provides for repayment of the mortgage money to the mortgagee or his personal representatives, whilst the mortgaged estate is, when re-conveyed, to go to those persons to whom it would have belonged had there been no mortgage, that is, to the mortgagor and his heirs. In the case of a mortgage of a lease by sub-lease the proviso for redemption runs "will surrender the said premises unto the mortgagor, his executors, administrators, and assigns."

Formerly it was the duty of the mortgagee on being paid off to reconvey to the mortgagor, and he could not be forced to convey to any other person unless the words "or as the mortgagor, his heirs, or assigns shall direct" were added at the end of the proviso. But the Conveyancing Act, 1881 (*g*) (as modified by the Conveyancing Act, 1882 (*h*), now provides that the mortgagor and any subsequent incumbrancer, on paying off the mortgagee, may require him, unless he is or has been in possession, to assign the mortgage debt and convey the mortgaged property to any third person notwithstanding any stipulation to the contrary (*i*).

Re-conveyance of the mortgaged estate.

A question may arise if the proviso for the re-conveyance of the mortgaged premises would, if literally carried out, alter the devolution of the equity of redemption.

If it is intended to transfer the beneficial ownership of the equity of redemption from the person entitled to the beneficial ownership of the estate at the time of the mortgage, or

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(*g*) 44 & 45 Vict. c. 41, s. 15. (*h*) 45 & 46 Vict. c. 39, s. 12.
(*i*) Elph. Conv. 189-90.

to vary his rights in any way, a full recital of this intention should be inserted in the deed (*j*), for a mere change in the ordinary wording will not be sufficient for this purpose.

After the proviso for redemption, there sometimes follow covenants by the mortgagor such as covenants to repair and to insure.

Covenant to insure.

If the property consists of buildings, the mortgagor sometimes enters into covenants to repair, and to allow the mortgagee to enter and view the state of repair, similar to those contained in leases. He should also covenant to insure all buildings and fixtures on the property; to keep them, so long as the mortgage lasts, insured for a specified amount; and to apply all moneys which may be received under such insurance in repairing any part of the premises, or fixtures, which may be destroyed by fire. The mortgagee has, even without this proviso, a right to insist upon money received under the insurance being laid out in repairing the mortgaged houses or buildings damaged or destroyed by fire (*k*), but he cannot, in the absence of agreement, compel the application of such money to the repair of fixtures removable by a tenant (*l*), except where the mortgagor has received money under an insurance which existed before the mortgage, and which he has kept up in pursuance of a covenant to that effect (*m*). The mortgagor's covenant to insure was formerly followed by a proviso that, in default of his keeping the premises insured, the mortgagee might do so, and add all money thus expended to the principal sum lent. But this has been rendered unnecessary by the Conveyancing Act, 1881, which (*n*) gives a mortgagee, if the deed has been executed after the 31st December, 1881, and no contrary intention has been expressed therein, power, at any time after the date of the mortgage deed, to insure any part of the

(*j*) Co. Litt. 208a, note (1).
(*k*) 14 Geo. II. c. 78, s. 83; *Ex parte Goreley*, 13 W. R. 60.
(*l*) *Ex parte Goreley*, 13 W. R. 60; *Lees* v. *Whiteley*, L. R. 2 Eq. 143.
(*m*) *Sinnott* v. *Bowden* [1912] 2 Ch. 414.
(*n*) 44 & 45 Vict. c. 41, s. 19.

mortgaged property for an amount not exceeding that specified in the deed, or if no amount has been specified in it, then for an amount not greater than two-thirds of the sum which would be required to restore the property were it totally destroyed. The premiums paid for any such insurance are to be charged on the mortgaged property, in addition to the mortgage money, and to carry interest at the same rate as the mortgage money. But the power is not to be exercised if there is a declaration in the mortgage deed that no insurance is required, or if an insurance is kept up by, or on behalf of, the mortgagor in accordance with the mortgage deed. All money received under any such insurance is to be laid out, if the mortgagor so requires, in making good the loss or damage on account of which the money is received, and subject to this, and to any special contract to the contrary, it is to be applied in discharge of the mortgage debt. It follows that the mortgagor's covenant to insure is not essential; but so long as the terms of the mortgage deed are observed, he may as well be allowed to act in this matter, as in others, as if he were the absolute owner of the property. Moreover an express covenant by the mortgagor to insure has certain advantages. It may increase the amount in which the mortgagee may, on default, insure under his statutory power; as the mortgagee has a statutory power of sale on breach of any covenant by the mortgagor at any time after the mortgage debt becomes due, it affords a guarantee that a proper insurance will be maintained; and, as stated above, if the mortgagor has already effected an insurance, covering fixtures, at the date of the mortgage deed, an express covenant by him to insure entitles the mortgagee to have the insurance money applied in making good the loss or damage in respect of which the money is received (*o*).

Power of leasing.

A mortgagor in possession, so long as no receiver has been appointed, and a mortgagee while in possession, or before taking possession if a receiver has been appointed and is

(*o*) Elph. Conv. 207; *Sinnott* v. *Bowden* [1912] 2 Ch. 414.

acting, have statutory implied powers of leasing (agricultural or occupation leases for any term not exceeding twenty-one years, and building leases for any term not exceeding ninety-nine years, at the best rent, without fine and with condition of re-entry), under the Conveyancing Act, 1881 (*p*), as amended by the Conveyancing Act, 1911 (*q*). The Conveyancing Act, 1911 (*r*), gives power to the mortgagor and mortgagee, while respectively in possession, to accept surrender of leases with a view to the grant of a lease authorised by section 18 of the Conveyancing Act, 1881, as varied by section 3 of the Conveyancing Act, 1911. The mortgagee can exercise the power instead of the mortgagor after the appointment of a receiver and so long as the receiver acts. The Conveyancing Act, 1881, s. 18, sub.-s. 13, provides that the statutory power of leasing is only to apply if and so far as a contrary intention is not expressed by the mortgagor and the mortgagee in the mortgage deed or otherwise by writing, and section 18, sub.-section 14 provides that nothing in the Act is to prevent the mortgage deed from reserving to or conferring on the mortgagor or mortgagee, or both, any further or other power of leasing.

Clauses restricting the statutory power of leasing are commonly inserted in mortgages of building estates and public-house property, and in such mortgages it is the practice to provide that the mortgagor shall not exercise the power of leasing without the consent in writing of the mortgagee. A restriction of the same kind upon the exercise by the mortgagor of his statutory power of leasing is sometimes inserted in ordinary mortgages of land, but, as the mortgagee can now exercise the statutory power of leasing instead of the mortgagor after a receiver has been appointed and while the receiver is acting, such restriction would appear to be unnecessary (*s*).

Power to consolidate.

By the Conveyancing Act, 1881 (*t*), it is provided that, in the case of mortgages made after the commencement of the

(*p*) 44 & 45 Vict. c. 41, s. 18.
(*q*) 1 & 2 Geo. 5, c. 37, s. 3.
(*r*) 1 & 2 Geo. 5, c. 37, s. 3.
(*s*) Elph. Conv. 213.
(*t*) 44 & 45 Vict. c. 41, s. 17.

Act, a mortgagor may redeem any one mortgage without paying any money due on any separate mortgage made by him, or by any person through whom he claims, on other property; but this section is to apply only if, and so far as, a contrary intention is not expressed in the mortgage deeds or one of them. If, therefore, it is desired that the mortgagee's right of consolidation shall be preserved a clause is inserted in the mortgage deed declaring that section 17 of the Conveyancing Act, 1881, shall not apply to the security. It is desirable to insert this clause if the mortgage is, or is likely to become, one of a series of mortgage transactions between the same parties (*u*).

Power of sale.

Foreclosure is a slow and expensive process, especially where there are several incumbrances on the mortgaged estate. Hence it became the almost universal custom to insert in the mortgage deed a power for the mortgagee to sell the property, and thus realise his security. As between the mortgagee and the mortgagor, this power was not to be exercised until there had been some default on the part of the mortgagor; but since a purchaser could not be expected to go into the question whether the power to sell had arisen, it was provided that, as regarded the safety and protection of a purchaser, no sale purporting to be made in exercise of the power should be invalidated by the fact that the mortgagee ought not to have sold. So far back as the year 1860, an Act was passed (*v*) which provided that a power of sale by the mortgagee, with its ancillary provisions, should be deemed to be contained in every mortgage deed executed after the passing of the Act, subject to anything to the contrary contained in the deed. But the power of sale which the Act gave to mortgagees was so framed as to be less advantageous to them than that usually inserted in mortgage deeds by conveyancers, and consequently, the statutory powers were seldom relied upon. The Conveyancing Act, 1881 (*w*), repealed the enactment previously mentioned, except as to anything properly done thereunder, and substituted new

(*u*) Elph. Conv. 228.
(*v*) 23 & 24 Vict. c. 145, ss. 11—25.
(*w*) 44 & 45 Vict. c. 41.

statutory powers of sale and other clauses. These are substantially the same as those approved of by conveyancers, which, consequently, may now be properly omitted.

Conveyancing Act, 1881.

The Act applies to every mortgage made after the 31st of December, 1881, except so far as its application appears by the mortgage deed to be limited or excluded. It provides (*x*) that the mortgagee shall have power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions as he thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale and to resell, without being responsible for any loss occasioned thereby. As between the mortgagee and the mortgagor the former is not to exercise the power of sale conferred by the Act unless and until notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money for three calendar months after such service; or unless some interest under the mortgage is in arrear and unpaid for two calendar months after becoming due; or unless there has been a breach of some provision contained in the mortgage deed, or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money and interest thereon (*y*). The Act, as amended by section 5 (sub-section 1) of the Conveyancing Act, 1911, provides (*z*) that where a sale is made in professed exercise of the power of sale conferred by the Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice had not been given, or that the power was otherwise improperly or irregularly exercised, and that the purchaser is not concerned

(*x*) S. 19.
(*y*) 44 & 45 Vict. c. 41, s. 20.
(*z*) S. 21; 1 & 2 Geo. 5, c. 37, s. 5, subs. 1.

to see or enquire whether the power is being properly and regularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power is to have his remedy in damages against the person exercising the power. It is, however, necessary for the purchaser to satisfy himself that the mortgage money has become due (*a*). The money arising from the sale after discharging or providing for any incumbrances to which the sale is not made subject, or after payment into Court of a sum to meet any prior incumbrance (*b*), is to be applied by the mortgagee, first, in payment of his costs and expenses of sale; secondly, in discharge of the mortgage debt; and the residue is to be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of sale thereof: words which include subsequent incumbrancers. The mortgagee, his executors, administrators, or assigns are not to be responsible for any involuntary loss incurred on or about the exercise of the power of sale or of any trust connected therewith (*c*); and his or their receipt in writing is (*d*) to be a sufficient discharge for any money arising under the power of sale, and a person paying the same to him or them is not to be concerned to inquire whether any money remains due under the mortgage. The Act also provides (*e*) that any notice required to be served on the mortgagor shall be sufficient, although only addressed to him by that designation without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained. And the notice will be sufficiently served if it is left at the mortgagor's last-known place of abode or business, in the United Kingdom, or is affixed or left for him on the land, or on any house or building, comprised in the mortgage. If the mortgagee be dead, his executors or administrators can not only sell the property but also convey

(*a*) Elph. Conv. 221.
(*b*) 44 & 45 Vict. c. 41, s. 5; *Re Wilberforce's Trusts* [1915] 1 Ch. 94.
(*c*) S. 21, subs. 6; as amended by Conveyancing Act, 1911, s. 5, subs. 2.
(*d*) S. 22.
(*e*) S. 67.

the legal estate in it, whatever its tenure may be (*f*). Hence, the clause which it was formerly necessary to insert in mortgage deeds of freeholds, that the mortgagee's heirs should, in such case, concur in the deed, is no longer necessary. It may be added that although the Act, as amended by the Conveyancing Act, 1911, s. 5, efficiently protects a purchaser who buys from the mortgagee without notice that there is any impropriety in the sale, it will not avail him if he knows that the power is not in fact exerciseable, unless the irregularity has been waived by the mortgagor (*g*).

A mortgagee is not a trustee of the power of sale. Therefore the Court will not interfere with his exercise of the power even though the sale be disadvantageous for the mortgagor (*h*). But the mortgagee cannot sell either directly to himself or to a trustee for himself (*i*); and he is liable as a trustee to the mortgagor, or to any second mortgagee of whose mortgage he has notice, in respect of any balance left after payment of all principal, interest, and costs due to him (*j*).

Conveyancing Act, 1911.

The statutory power of sale given by the Conveyancing Act, 1881, did not meet the requirements of the case where the property mortgaged was suitable for development as a building estate or as mining property. Thus a mortgagee, under the statutory power of sale, could not sell the land and reserve the minerals, or *vice versa*, without the consent of the mortgagor. The Conveyancing Act, 1911, however, now provides (*k*) that the statutory power of sale (in the case of mortgages made after 1911) shall include power to impose restrictive covenants or conditions on the unsold part of the mortgaged property or on the purchaser and any property sold, and to sell the mortgaged property, or any part thereof, or any mines and minerals, apart from the surface (i) with

(*f*) S. 30; Elph. Conv. 223.
(*g*) Elph. Conv. 222.
(*h*) Elph. Conv. 223—4; *Nutt* v. *Easton* [1899] 1 Ch. 273.
(*i*) *Hodson* v. *Deans* [1903] 2 Ch. 647.
(*j*) 44 & 45 Vict. c. 41, s. 21, subs. 3.
(*k*) 1 & 2 Geo. 5, c. 37, s. 4.

or without a grant or reservation of right for building or other purposes in relation to the property remaining in mortgage or the property sold, and (ii) with or without an exception or reservation of mines or minerals in or under the mortgaged property and with or without a grant or reservation of powers of working, easements, etc., for or connected with mining purposes in relation to the property sold or retained; (iii) with or without covenants by the purchaser to expend money on the land sold (*l*).

Receiver.

Before the passing of the Act of 1860, already referred to, it was requisite to insert in a mortgage deed power for the mortgagee to appoint a person to receive the income of the mortgaged property and pay it over to him. The above-mentioned Act contained provisions which rendered such a clause unnecessary; and although the sections of it which related to this point have been repealed by the Conveyancing Act, 1881, so far as regards mortgages made after the latter Act came into operation, they have been in substance re-enacted by it. The Act of 1881 (*m*) gives the mortgagee power, when he has become entitled to exercise his power of sale, to appoint a receiver of the income of the mortgaged property, or of any part thereof, by writing under his hand. The receiver is to be deemed to be the agent of the mortgagor, who alone is to be responsible for his acts and defaults, unless the mortgage deed otherwise provides. He is to demand (and, if necessary, to recover by action or otherwise) all the income of the property, and is to apply it, first, in payment of all outgoings of the property and of the interest on any prior mortgages; next, of his own commission; after that, of the interest on the mortgage in right whereof he is receiver; and then hand over any surplus to the mortgagor. He is also to have power to give effectual receipts for all income which he receives, and a person paying money to him is not to be concerned to inquire whether any case has happened to authorise the receiver to act (*n*).

(*l*) Elph. Conv. 217—8.
(*m*) 44 & 45 Vict. c. 41, ss. 19, 24.
(*n*) S. 24.

Attornment by mortgagor to mortgagee.

If the mortgagor is in actual occupation of the mortgaged property, the mortgage deed sometimes contains a clause, in which the mortgagor declares himself to be tenant to the mortgagee in respect of all the mortgaged premises, and agrees to pay a yearly rent accordingly. This rent, both in its amount and time of payment, corresponds, usually, with the interest payable by the mortgagor, and is applicable in or towards satisfaction of the debt and interest. The advantage of the clause formerly was that the attornment gave the mortgagee a power to distrain for any rent which might be in arrear, and thus afforded him a ready means of enforcing payment of the interest, or instalments, due from the mortgagor. Sometimes instead of the attornment clause an express power of distress for the interest was inserted. But by the Bills of Sale Acts, 1878 to 1882, an attornment clause, in so far as it implies a power of distress, and an express power of distress, are to be deemed "bills of sale, within the meaning of the Act, of any personal chattels which may be seized or taken" under them; and every bill of sale for securing the payment of money must be in a specified form to which a mortgage of land cannot conform. A power of distress, therefore, whether express or implied, is now invalid. But, notwithstanding the Bills of Sale Acts, the attornment clause is still valid for the purpose of creating the relation of landlord and tenant between the mortgagor and the mortgagee (*o*), and it, therefore, enables the mortgagee, if he wishes to claim possession, to indorse his writ specially under Order III., r. 6, and to obtain speedy judgment under Order XIV., r. 1, of the rules of the Supreme Court (*p*).

The reservation of rent would, if standing alone, create a yearly tenancy between the mortgagor and the mortgagee, which could not be put an end to without six months' notice. In order to obviate this, the attornment clause should be followed by a proviso enabling the mortgagee to enter upon

(*o*) *Mumford* v. *Collier*, 25 Q. B. D. 279.
(*p*) Elph. Conv. 228—9.

the premises at any time, without notice, and thus to determine the tenancy created by the attornment.

The deed is concluded by the ordinary Testimonium. It may be mentioned that by virtue of the Conveyancing Act, 1881 (*q*), every person entitled to redeem a mortgage is entitled, from time to time, at reasonable times, on his request and at his own cost and on payment of the mortgagee's costs and expenses in that behalf, to inspect and make copies or abstracts of, or extracts from, the documents of title relating to the mortgaged property in the custody or power of the mortgagee. This right exists only where the mortgage is made after the 31st December, 1881, but, in that case, is to have effect notwithstanding any stipulations to the contrary.

Courts (Emergency Powers) Acts, and Increase of Rent and Mortgage Interest (Restrictions) Act.

By the Courts (Emergency Powers) Acts, 1914-7, the powers of the mortgagee, when the mortgage was executed before August 4, 1914 (or on or after that date if the mortgagor subsequently joined His Majesty's forces), to take possession, appoint a receiver, sell or foreclose, are subject to certain special restrictions. Thus a mortgagee cannot take possession, appoint a receiver, or sell without leave of the Court. These Acts remain in force until the "termination of the war," as proclaimed by Order in Council, and for six months thereafter. By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, repealing the Increase of Rent and Mortgage Interest Acts of 1915 and 1919), where mortgaged property consists of or comprises one or more dwelling houses or business premises to which the Act applies (see above p. 141), which are let or have been let at some time covered by the Act or the repealed Acts, the mortgagee cannot, except in certain cases stated in the Act, call in his mortgage or proceed in any way to enforce it if interest at the permitted rate is paid and the covenants, other than for payment of the mortgage money, are performed and the

(*q*) 44 & 45 Vict. c. 41, s. 16.

property is kept in repair; nor can the mortgagee increase the rate of interest beyond a certain amount stated in the Act. The Act remains in force until the 24th June, 1923, except in regard to business premises, the provisions as to which continue until the 24th June, 1921. The Act does not apply (*inter alia*) to equitable charges by deposit of title-deeds or otherwise, or to mortgages created after the 1st July, 1920.

Transfers of mortgages.

As a rule it is not necessary for the mortgagor to join in a transfer of the mortgage, as the mortgagee has power to assign the mortgage debt and interest and the security without the concurrence of the mortgagor. But if a mortgagee has taken possession, he cannot give it up without the permission of the mortgagor (*r*), and if he transfers the mortgage without the concurrence of the mortgagor, he remains liable for his own acts and defaults done or made while he is in possession, and becomes liable, after the transfer, for the acts and defaults of the transferee, unless he transfers under the direction of the Court (*s*). Moreover it is always advisable, if the mortgagor is willing to concur, to make him a party to a transfer of the mortgage, because, by joining in the transfer deed, he is bound by the recital in the transfer deed as to the state of the debt. If he is not a party, inquiry should be made of him before completion as to the state of accounts between him and the mortgagee (because part of the mortgage debt may have been paid off); and notice of the transfer should be given to him; for, if he were not a party and had no notice of the transfer, he might set off against the claim of the transferee not only all moneys paid by him towards the discharge of the mortgage debt before the assignment but also moneys so paid after the assignment but before notice of it (*t*). The form of a transfer of a mortgage varies according as to whether the mortgagor is, or is not, a party. If he is not made a party to the transfer, the debt and interest is assigned by the mortgagee to the transferee,

(*r*) *Re Prytherch*, 42 Ch. D. 590.
(*s*) *Hall* v. *Heward*, 32 Ch. D. 430.
(*t*) Elph. Conv. 272

and the mortgagee conveys the mortgaged property to the transferee subject to such right or equity of redemption as the same premises are now subject to by virtue of the mortgage deed. The habendum is worded in the same way if the mortgagor joins in the transfer but has incumbered the equity of redemption.

The object of assigning the debt is to enable the transferee to sue on the covenant for payment contained in the mortgage. If the mortgagor is a party to the transfer, the only object of the assignment of the debt is to show that it is intended to be kept alive for the protection of the transferee, since a fresh covenant by the mortgagor for payment is given to the transferee. In either case the express power of sale, if any, and other express powers of the mortgagee need not be expressly transferred, for, if properly framed—*i.e.*, made exercisable by the mortgagee "and his assigns"—they will pass to the transferee without mention as the assign of the original mortgagee, and, if not so properly framed in the original mortgage deed, they will not be assignable (*u*). The mortgagee's statutory powers of sale, etc., are exercisable by the transferee by force of the transfer (*v*).

When the mortgagor is a party to the transfer, the deed recognises the existence of any express powers so as to exclude any doubt as to the intention to keep them alive. This is done, not by assigning them, but by adding to the assignment of the debt the words "with the benefit of the power of sale and of all other powers, etc., given by the mortgage for securing or recovering the said principal sum and interest." When the mortgagor is a party to the transfer, the conveyance is expressed to be made at his request, and, if he has not incumbered the equity of redemption, he joins as a conveying party. In this case the mortgagee conveys at the request of the mortgagor, and the mortgagor conveys and confirms, and the habendum is usually made free from the existing equity of redemption,

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(*u*) *Re Rumney and Smith* [1897] 2 Ch. 351.
(*v*) Elph. Conv. 268.

but subject to a new proviso for redemption on payment to the transferee. If the mortgagor be a party, he covenants for principal and interest so that the transferee may have his own covenants to sue upon. If the equity of redemption has been incumbered, covenants for title by the mortgagor or a new power of sale would be useless; but where it has not been incumbered, covenants for title are implied by the mortgagor conveying "as beneficial owner"; and formerly a fresh power of sale and other powers were usually inserted for the benefit of the transferee; but now the statutory powers are relied upon (*w*).

Whether the mortgagor is a party or not, the mortgagee assigns the debt and conveys the mortgaged property "as mortgagee" so as to imply, under the Conveyancing Act, 1881, a covenant that he has not incumbered.

Transfer deed indorsed or supplemental.

When both mortgagee and transferee are clients of the same solicitor, it is possible to make the transfer by a deed indorsed on the original mortgage deed (*x*). Brevity may also be obtained by making the transfer supplemental to the mortgage; in which case, under the Conveyancing Act, 1881, s. 53, the transfer shall be read as if it were indorsed on the mortgage deed or contained a full recital thereof.

Transfer on appointment of new trustees.

When the mortgage is vested in trustees, and the fact of their being trustees does not appear on the title, and the mortgage has to be transferred upon an appointment of new trustees, it is necessary to frame the transfer so as "to keep the trusts off the title," for if they be disclosed the instrument declaring the trust will become a title-deed to the mortgaged property. This is done by reciting that the mortgage debt now belongs in Equity to the transferees on a joint account and that the transferors have agreed, at the request of the transferees, to make a transfer of the mortgage debt and securities. The transfer is then expressed to be made in pursuance of the said agreement and "in consideration of the premises," and the mortgage debt is

(*w*) Elph. Conv. 270. (*x*) See Precedent XXIX.

assigned, and the mortgaged lands conveyed, to the transferees. A transfer of a mortgage on the appointment of new trustees need only be stamped with a ten-shilling stamp (*y*), whereas a transfer for value would bear an *ad valorem* stamp. But the Conveyancing Act, 1911, provides (*a*) that a purchaser shall not, by reason only of the transfer bearing a ten-shilling stamp, be deemed to have notice of any trust.

Transfer of mortgage of copyhold.

When the property is copyhold, the form of the transfer will vary according to the way in which the mortgage has been effected. If the mortgage has been made by covenant to surrender, not followed by conditional surrender, the mortgagee has an equitable interest in the copyhold. The mortgagee "as mortgagee" assigns the copyhold and the benefit of the covenant to surrender, with power to sue in the name of the transferor, habendum to the transferee, his heirs and assigns, subject to the existing equity of redemption on payment to the transferee. If the mortgage has been effected by a conditional surrender, and the mortgagor concurs, and there has been no subsequent incumbrance on the equity of redemption, satisfaction of the old surrender should be entered up on the manor rolls, and a new conditional surrender by the mortgagor to the use of the transferee should be made. If the mortgagor does not concur, or if he has made subsequent surrenders, the mortgagee should be admitted, and should then surrender to the use of the transferee subject to the existing equity of redemption (*b*). If the mortgagee has been admitted, he will surrender to the use of the transferee subject to the existing equity of redemption (*c*).

Transfer of mortgage of leaseholds.

A transfer of a mortgage of leaseholds follows the same general form as the transfer of a mortgage of freeholds, but the assignment of the property and the habendum are to the transferee, his "executors, administrators and assigns,"

(*y*) Stamp Act, 1891 (54 & 55 Vict., c. 39), s. 62.
(*a*) 1 & 2 Geo. 5, c. 37, s. 13; *Re Soden and Alexander* [1918] 2 Ch. 258.
(*b*) See Precedent XXXI. (*c*) Elph. Conv. 274—6.

or to the transferee simply, and there is no declaration of uses (*d*). If the mortgage was by sub-lease, and there is a declaration of trust of the reversion of the last day or few days of the term for the mortgagor, this should be assigned (*e*).

Transfer when mortgagee is dead.

When the mortgagee is dead, the form of the transfer depends upon the date of his death. The mortgage debt would in any case be assigned by his legal personal representatives, or by the legatee of the debt after the legacy has been assented to by the legal personal representatives. If the property mortgaged is personalty, such as leaseholds, a transfer of the property can be made by the mortgagee's personal representatives or by the legatees of his mortgage estates after the legacy has been assented to. If the property mortgaged is freehold, and the mortgagee died before 1882, the transfer is made by his heir or the devisee of his mortgage estates (*f*). If he died after 1881, it is made by his legal personal representatives (*g*). If the property mortgaged is copyhold, and the mortgagee has not been admitted, and the mortgagor is not a party or has incumbered the equity of redemption, then, if the mortgagee died before 1882, the customary heir or devisee of the mortgagee must be admitted; and, if the mortgagee died after 1881, the personal representatives of the mortgagee must be admitted; and must then surrender to the use of the transferee, subject to the equity of redemption existing under the conditional surrender. If the mortgagee was not admitted, and the mortgagor is a party and has not incumbered the equity of redemption, the existing conditional surrender will be vacated, and the mortgagor will covenant to make a conditional surrender to the use of the transferee, and will appoint him his attorney to make the surrender. If the mortgagee was admitted on the conditional surrender, the right to be admitted on his death appears to be vested in his

(*d*) See Precedent XXIX.
(*e*) Elph. Conv. 276.
(*f*) The provisions of the Vendor and Purchaser Act, 1874, s. 4, did not apply to a transfer of a mortgage.
(*g*) Conveyancing Act, 1881, s. 30.

customary heir or devisee (*h*), although, possibly, if the mortgagee died after 1881 and before 16th of September, 1887 (the date when the Copyhold Act, 1887, came into force), the right may be vested in his personal representatives. The person who is to be admitted will covenant with the transferee to be admitted and to surrender. If the mortgage was made by covenant to surrender, not followed by conditional surrender, the mortgagee's personal representatives can convey to the transferee his equitable interest in the land, which carries with it the right to require the mortgagor to make a surrender (*i*).

Reconveyance.

When the mortgage debt is paid off, the equitable interest of the mortgagee comes to an end. If the mortgage is equitable, no reconveyance is necessary, a receipt for the mortgage money and interest being sufficient to discharge the property. But when the mortgage is a legal mortgage, it becomes the duty of the mortgagee to reconvey the legal estate to the mortgagor, or, unless the mortgagee is or has been in possession, to any third person as the mortgagor shall direct (see Conveyancing Act, 1881, s. 15). If both mortgagor and mortgagee are clients of the same solicitor, the reconveyance can be made by a deed indorsed on the mortgage, the conveyance containing no recitals and the mortgagee "as mortgagee" conveying to the mortgagor free from "all principal moneys and interest intended to be secured by the within mentioned indenture." When the reconveyance cannot be indorsed, the mortgage must be formally recited, and there must be recitals stating the dealings, if any, with it and the state of the mortgage debt (*j*); or the reconveyance may be made supplemental to the mortgage, and will contain a recital of the existing state of the debt. The estate is then reconveyed to the mortgagor freed from all charges under the mortgage deed (*k*).

(*h*) Copyhold Act, 1894, s. 88, replacing Copyhold Act, 1887, s. 45; *Re Mills*, 37 Ch. D. 312; 40 Ch. D. 14.
(*i*) Elph. Conv. 277-8.
(*j*) Precedent XXXII.
(*k*) Elph. Conv. 285-6.

If there should be no reconveyance, but the mortgagor remains in possession, the mortgagee's legal estate will, under the Statute of Limitations, be extinguished at the end of thirteen years from the time of the money being repaid to him.

Reconveyance of leaseholds.

In a reconveyance of leaseholds, the mortgagee will, if the mortgage was by assignment, reassign and release; if the mortgage was by sub-lease, the mortgagee, even if the sub-lease is a second or later mortgage (*l*), will surrender and release to the mortgagor the property comprised in the mortgage (*m*).

Reconveyance of copyholds.

When the mortgage comprises copyholds, and there has been merely a covenant to surrender, a receipt for the mortgage money and interest would in Equity operate as a release from the debt, but the practice is to release the debt by deed. If a conditional surrender has been made, the mortgagee signs a warrant to enter up satisfaction on the surrender (*n*), by virtue of which satisfaction is entered up on the Court Rolls so as to discharge the land. If the mortgagee has been admitted, he will have to surrender to the use of the mortgagor, who will then be readmitted.

Reconveyance when mortgagee is dead.

If the mortgagee is dead, the form of reconveyance depends upon the date of his death as well as on the nature of the property. If he died before August 7, 1874, the mortgaged land, whether freehold or copyhold, devolved on his heir or devisee, who is the proper person to convey or surrender the mortgaged estate. If he died on or after that day and before 1882, the reconveyance can be made by his heir or devisee or, on payment of all sums secured by the mortgage, by his legal personal representative (Vendor and Purchaser Act, 1874, s. 4). This provision did not apply to a transfer (*o*). If the mortgagee died after 1881, the reconveyance of freeholds is

(*l*) *Re Moore and Hulm's Contract* [1912] 2 Ch. 105; Elph. Conv. 286.
(*m*) Precedent XXXIV.
(*n*) Precedent XXXIII.; Elph. Conv. 287.
(*o*) *Re Spradbery's Mortgage*, 14 Ch. D. 514.

made by his legal personal representatives. (Probably one of several personal representatives can reconvey, as the provisions of the Land Transfer Act, 1897, Part 1, do not appear to apply in this case.) If the property consists of copyholds, and the mortgagee has been admitted, and the mortgagee has died after 1881, but before 16th September, 1887, it is doubtful whether the legal personal representative or the customary heir or devisee of the mortgagee should reconvey, but if the mortgagee has died on or after the 16th September, 1887, the legal estate devolves upon the devisee or customary heir of the deceased mortgagee (*p*) and he should reconvey. The reconveyance of mortgaged leaseholds or other personalty can, and always could, be made by the legal personal representatives of the mortgagee, or the legatee of such personalty if the legacy has been assented to.

Sub-mortgage.

Sometimes a mortgagee wishes to receive only part of his money and is unwilling to disturb his original investment, as, for instance, where a mortgagee has advanced £10,000 on mortgage of land worth £15,000 and wishes to raise £500. In such a case a sub-mortgage, or mortgage by the mortgagee of the mortgage debt and security, is resorted to. The deed recites the original mortgage, and that the debt is still due, and the agreement by the sub-mortgagee to lend £500 to the mortgagee. The mortgage debt is assigned to the sub-mortgagee, habendum to the said sub-mortgagee, his executors, administrators, and assigns, or to the sub-mortgagee simply, "subject to the proviso for redemption hereinafter contained," *i.e.*, to redemption on payment of the £500 and interest. The property comprised in the original mortgage will be conveyed to the sub-mortgagee, his heirs and assigns, subject to the right or equity of redemption of the original mortgagor, and subject also to a proviso for redemption by the mortgagee. In the example suggested, the proviso for redemption would be on payment of £500 and interest by the original mortgagee to the sub-mortgagee (*q*).

(*p*) *Re Mills Trusts*, 37 Ch. D. 312; 40 Ch. D. 40; Copyhold Act, 1894, s. 88, replacing Copyhold Act, 1887, s. 45.

(*q*) Precedent XXXV.; Elph. Conv. 290—2.

Under the proviso contained in the original mortgage, the mortgagor can redeem the land on payment of £10,000—that is, £9,500 to the original mortgagee and £500 to the sub-mortgagee—and can then claim a reconveyance from both of them. Under the proviso contained in the sub-mortgage, the original mortgagee can redeem the debt of £10,000, and the security for it, on payment of £500, and can then claim a reassignment of the debt of £10,000 and a reconveyance of the land, subject, as to the latter, to the proviso for redemption contained in the original mortgage.

The statutory power of sale conferred by the sub-mortgage authorises the sub-mortgagee to sell his security—*i.e.*, the mortgage debt of £10,000 and the land subject to redemption — on payment of £10,000. The sub-mortgagee can also (as a "mortgagee" within the definition of the Conveyancing Act, 1881, s. 2 (6)), exercise the statutory power of sale conferred by the original mortgage. He has, then, two distinct powers of sale. The power of sale contained in the sub-mortgage is only to be exercised if the sub-mortgagor makes default; the sale passes the debt of £10,000, but the land is sold subject to the mortgagor's equity of redemption. The power of sale contained in the original mortgage is only to be exercised if the original mortgagor makes default, but, if exercised, it passes the land to the purchaser free from all equity of redemption. In the first case, the purchaser from the sub-mortgagee purchases the mortgage debt and the security; in the second case, he purchases the land itself. Thus, in the first case, he might pay to the sub-mortgagee £10,000, out of which the sub-mortgagee would pay himself £500 and interest, if any due, handing the balance to the mortgagee. In the second case he pays the sub-mortgagee the full value obtainable for the land, say £15,000, out of which the sub-mortgagee pays himself £500 (and interest, if any, due), and pays £9,500 to the mortgagee and the balance to the original mortgagor. If the sub-mortgagee is selling under the latter power, the purchaser (unless the sub-mortgage expressly provides to the contrary) must see to the application of the purchase money,

as the provisions of the Conveyancing Act, 1881, s. 22 (1) do not cover the case of a sub-mortgage.

The sub-mortgagee should inquire of the original mortgagor, before completion of the sub-mortgage, as to the state of accounts between him and the mortgagee, and he should give notice to him of the sub-mortgage (*r*).

Statutory mortgage.

It remains to add that the Conveyancing Act, 1881, has in a schedule some forms of statutory mortgage and transfer and reconveyance of mortgage. But these apply only to the simplest cases, and even so as not to appear to have any practical advantage over the forms generally used. A statutory mortgage can, but a mortgage made in the ordinary form cannot, be transferred or reconveyed by a statutory transfer or reconveyance.

(*r*) Elph. Conv. 292.

CHAPTER VI.

OF SETTLEMENTS (*a*).

I. *Strict settlements of freehold.*

HITHERTO we have dealt only with instruments having for their object the alienation of land, either absolutely or temporarily; we turn now to those which seek to prevent its alienation, so far as the law will allow. This object may be attained either by wills operating as settlements or by settlements proper. These latter again are divided into family settlements, whereby provision is often made for several branches of one family, and marriage settlements, the benefits of which are primarily conferred only on two persons about to marry, and their issue. Settlements made by wills, or by means of family settlements, may, evidently, take almost innumerable forms, varying with the wishes of each individual settlor, and cannot be properly dealt with in an elementary work like the present. We will, therefore, confine our attention to the less complex subject of marriage settlements, dealing first with a specimen of the most ordinary form; that, namely, which is usually known as a "strict" settlement.

A "strict" settlement.

The object of such an instrument is to give the settled property to the eldest son of the marriage in tail male, subject to its providing a life income for the husband and wife and portions for the younger children: the deed containing, in addition to the clauses apt for these purposes, some which provide for various contingencies, and others whereby the wishes of the settlors can be more effectually carried out.

(*a*) See Precedents XXXIX. to XLII.

Parties.

The settlement, after the usual formal introduction, states the parties to the deed. These consist of the intended husband and wife respectively, and of trustees, whose functions we shall presently consider. Supposing that, as is more ordinarily the case, the estate to be settled belongs to the future husband, the first thing to be done is to keep it in his absolute possession until the marriage is solemnised. This can be accomplished by means of a shifting use, the application of which to this purpose is one of the many advantages derived from the passing of the Statute of Uses. With this object the deed proceeds to witness that, in consideration of the intended marriage, and in pursuance of a previous agreement, the intended husband, as settlor, and with the approbation of the intended wife, conveys the property in fee-simple to the trustees. This he does by assuring it to them by means of the same words of conveyance and clauses as are usually contained in purchase deeds; the habendum being to the use of himself (the husband) in fee-simple until the solemnisation of the marriage; thus effecting no change in his ownership until that event takes place.

Conveyance by husband as settlor.

Where the husband conveys as settlor, he, by virtue of the Conveyancing Act, 1881 (*b*), enters into an implied covenant that he, and every person deriving title under him by deed, or act, or operation of law in his lifetime subsequent to the settlement, or by testamentary disposition or devolution in law on his death, will, from time to time, and at all times, after the date of the settlement, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the settled property to the trustees and those deriving title under them, as shall be reasonably required. The settlor may convey "as beneficial owner," in which case full covenants for title under the Conveyancing Act, 1881, s. 7, are implied.

Wife's pin-money.

The settlement then proceeds to state the uses which are to take effect after the marriage. Of these the first

(*b*) 44 & 45 Vict. c. 41.

limitation is to the use that the wife may during the joint lives of herself and her husband receive out of the income of the property, by way of pin-money, for her separate use and without power to deprive herself of it by anticipation, a yearly rent-charge of a specified amount. Pin-money is, as its name implies, money applicable to the personal expenses of the wife, for her dress and for her pocket-money.

Term for securing pin-money not necessary.

It was formerly customary to secure the payment of the wife's pin-money by limiting a term of ninety-nine years to trustees (such trustees being distinct from the trustees appointed to exercise the general powers of the settlement), and declaring the trusts of it to be that they should, during the joint lives of the husband and wife, out of the rents and profits of the property, or by sale of the timber or minerals, or by mortgage of the property for the whole or any part of the term, raise the amount necessary, from time to time, for the payment of the pin-money, and, subject thereto, and to the payment of their expenses, should allow the rents to be received by the husband or his assigns. This, however, is now unnecessary. The Married Women's Property Act, 1882 (*c*), enables a married woman to hold any real or personal property as her separate property without the intervention of any trustee, and the Conveyancing Act, 1881 (*d*), provides that where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, and whether by way of rent charge or otherwise, not being rent incident to a reversion, then such person, if the annual sum or any part thereof is in arrear for twenty-one days, may distrain upon the land for the amount so due, and dispose of the distress in order to pay the sum due and all the costs of the distress; and if the annual sum or any part thereof is in arrear for forty days after it is due, the person so entitled may enter upon and take possession of the land and receive the rents until all the arrears and costs are fully paid; or may, whether taking possession or not, by deed demise the land charged,

Married Women's Property Act, 1882.

Conveyancing Act, 1881.

(*c*) 45 & 46 Vict. c. 75, s. 1. (*d*) 44 & 45 Vict. c. 41, s. 44.

or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged or any part thereof, or by receipt of the income thereof, or by any or all those means, or by any other reasonable means, to raise and pay the annual sum due, or to become due, together with all the costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling payment of it.

It was formerly doubtful whether a power of distress or of entry, conferred by an instrument for the purpose of securing such an annual sum, would not be void as infringing the rule against perpetuities, unless restricted so as to be exercisable only during lives in being and twenty-one years from death of survivor. But the Conveyancing Act, 1911, now expressly declares (*e*) that the rule of perpetuities does not apply to these powers and remedies given by the Conveyancing Act, 1881, nor to the same or like powers conferred by an instrument for the same purpose. The Conveyancing Act, 1911 (*f*), declares that the powers and remedies given by the Conveyancing Act, 1881, s. 44 are exercisable whether the annual sum is created under a power contained in an instrument coming into operation before or after the commencement of the Act of 1881, and take effect unless the instrument creating the power or under which the annual sum is created otherwise directs.

The limitation of the rent charge to the use of the wife gives her a legal rent charge in the land, in the same way as if it had been granted to her directly. For the Statute of Uses (*g*) enacts that where any person shall be seised of any land to the use and intent that some other person shall have any annual rent thereout, the person that has such use shall be deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the use of it; and as

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(*e*) 1 & 2 Geo. 5, c. 37, s. 6. (*f*) 1 & 2 Geo. 5, c. 37, s. 6 (2).
(*g*) 27 Hen. 8, c. 10, s. 6.

if a sufficient grant of such rent had been made to them by the persons seised of the use.

Subject to the rent charge for securing the wife's pin-money, the next use is to the husband for life without impeachment of waste: thus giving him the legal estate in the property during his lifetime, with as much power over it as is consistent with the interests of the remaindermen. He is, therefore, in a position to deal with the estate much as a prudent man would deal with one of which he was absolute owner; being allowed to open mines and quarries, pull down buildings when necessary, and cut ordinary timber for his own benefit (*h*); whilst, on the other hand, he cannot commit that which is known as "equitable waste," such as pulling down the mansion-house of the estate (*i*), or cutting ornamental timber (*j*). A tenant for life under a settlement, whether impeachable for waste or not, has now, under the Settled Land Acts, 1882-90, wide powers of granting leases and cutting down timber. He can also under the Settled Land Acts, 1882-90, sell all or any part of the settled estate, in which case the purchase-money will be invested for the benefit of the persons entitled under the settlement.

Wife's jointure.

Provisions having been thus made for the wife during the coverture, and for the husband during his life, the next thing is to give an income to the wife in case she survives her husband. With this object the next limitation is to the use that, if the wife survive the husband, she may receive during her lifetime, in lieu of all dower and freebench, a specified yearly sum for her jointure, such sum being charged upon the property, and payable quarterly; the first payment being made at the expiration of three calendar months from the death of the husband.

(*h*) *Bowles' Case*, 11 Rep. 79b; and Tu. L. C. 37.
(*i*) *Vane* v. *Barnard*, 2 Ver. 738.
(*j*) *Downshire* v. *Sandys*, 6 Ves. 107; see also the notes to *Garth* v. *Cotton*, 1 L. C. 751.

Meaning of jointure.

The word "jointure" is synonymous with "provision" (*k*); the old way of securing a jointure was to set aside, for that purpose, the rents and profits of some particular estate belonging to the husband; and in most great families the same estate was commonly so settled from generation to generation. Hence the frequent occurrence, on large estates, of a house distinguished as "the jointure house."

A jointure made in conformity with the requirements of the Statute of Uses (*l*) will bar the widow's right to dower; but it is usual to state in the deed that the provision thus made for her is to be in lieu of all dower and freebench, because the intention to bar dower must, in order to operate under the statute, be either expressed (*m*) or clearly implied (*n*), and because, although jointure may act as a bar to freebench in equity, the statute itself does not extend to copyholds (*o*).

The deed may contain a provision that the wife shall be restrained from anticipating her jointure so as to render it inalienable during coverture without an order of the Court under the Conveyancing Act, 1911, s. 7. On the death of the husband the restraint ceases, but if the widow marries again, without having in the interval alienated her jointure rent charge, the restraint again springs up.

The widow's remedies for compelling payment of her jointure will, of course, be the same as those which a wife has in respect of her pin-money.

Term for securing portions.

The husband and wife being thus provided for, the claims of the younger children have next to be attended to; for this purpose a long term is limited to the use of the trustees without impeachment of waste, the trusts of this term being set out later.

(*k*) See *Hervey* v. *Hervey*, 1 Atk. 560, 562.
(*l*) 27 Hen. 8, c. 10, s. 6. (*m*) Co. Litt. 36b.
(*n*) Co. Litt. 36b, note B.; *Vizard* v. *Longdale*, *cited* 3 Atk. 8.
(*o*) Elph. Conv. 478.

It is still necessary to employ a term of years for the purpose of raising portions for the younger children; for such portions, unlike pin-money and jointure, are not annuities but lump sums of money payable to the younger children at a certain age. The term of years is limited to the use of the trustees, the trustees thereby taking the legal estate in the term under the Statute of Uses without the necessity of entry on the land. Hence, as the portions term precedes the estates in tail limited by the settlement, the term cannot be defeated by the tenant in tail barring the fee tail. The term of years granted is of a long period, 500 or 1,000 years, in order that the trustees can mortgage, if this be necessary, for the purpose of raising the portions of the younger children, what is practically as good a security as the fee-simple.

Remainders.

Then comes the limitation which gives the property, subject to the various estates and charges which we have enumerated, to the first and other sons successively of the marriage in tail male, with remainder to the sons in tail general; and, in default of sons and their issue, to the daughters in equal shares as tenants in common in tail general, with a proviso that in the event of any daughter not having issue, or of such issue failing, her share, both original and any share accrued to her or her issue, shall go over to the other daughters and the heirs of their bodies in equal shares as tenants in common and if there shall be a failure of issue of all such daughters but one, or if there shall be but one such daughter, then the whole property is to go to the use of such one or only daughter in tail. These limitations take effect as legal contingent remainders; the final limitation in default of such issue being to the husband, his heirs and assigns, for ever.

The form of the limitation over to the daughters is termed a cross-remainder. Its effect may be explained as follows. Supposing there are three daughters of the marriage, A, B, C. They each take an original one undivided third share in tail. Supposing A to die without issue, her original one

third passes over to B and C. Now let us assume that B dies also without issue. Under the limitation in the deed, B's original one third share passes over to C, and also her accrued share, *i.e.*, the half of A's original one third. It is important to state in the settlement that the accrued share, as well as the original share, shall pass over to the surviving daughters, if one daughter die without issue or her issue fail, because if this be not done, the accrued share (*e.g.*, of B in our example) would not pass over to her surviving sisters or their issue, but would pass to the next remainderman (*p*).

Trusts of the term to secure portions.

Next comes the declaration of the trusts of the term which has been limited to the trustees. These trusts are that the trustees, after the death of the husband, or in his lifetime with his consent in writing, shall by mortgage of the whole or any part of the premises, for all or any part of the term, or by the sale of the minerals or timber thereof, or out of the rents and profits of the estate, or by any other reasonable means, raise a sum of money for the portions of such of the children (other than the first or only son, or than any son who before attaining the age of twenty-one shall become entitled to the property as first tenant in tail male) as, being sons or a son, shall attain the age of twenty-one years or being daughters or a daughter, shall attain that age or marry under that age. The sum thus raisable generally varies in amount, being gradually increased according to the number of such children, but with a fixed *maximum* which is not to be exceeded in any case. The result of this form of trust is, that no child can acquire a vested interest in a portion except on attaining majority, or, in the case of a daughter, on attaining majority or being married: and this plan seems preferable to making the number of portions raisable depend merely on the number of children born, for under such an arrangement a younger child who happens to be the only survivor amongst several others may get a portion very much larger than that raisable under the settlement in the event of there being only one

(*p*) Elph. Conv. 490—1.

Who may take a portion.

younger child born (*q*). It will be observed that the first-born son of the marriage is entirely precluded from having any share of the portions fund, but that a younger son who happens to succeed to the estate will not necessarily lose his portion except when he has become tenant in tail before attaining his majority. But if it is intended that he should be so favoured, there must be an express statement to that effect in the settlement, for the general rule is, that unless there is a strong presumption to the contrary, as where the words used are the same as, or similar (*r*) to, those employed here, a son who at any time before his father's death becomes entitled to the estate (*s*) shall not have any share in the portions fund, even though an appointment of part of it has been already made in his favour (*t*).

Time for payment of portions.

The clause next goes on to point out when, and how, children enabled to take a portion shall be entitled to payment of it. It says, therefore, that if there is only one such child, and he, or she, shall not attain twenty-one, or, if a daughter, attain that age, or marry, until after the death of the husband, such child's portion is to be paid at once, at majority or marriage, as the case may be. If, however, the husband is alive at that time, then the payment of the portion is to be postponed until after his death, unless he shall request in writing the trustees to raise the portion in his lifetime. When there are two or more younger children in a position to take portions, the portions fund is either to be divided amongst such of them, and in such shares, and at such age or time (not earlier than their majority, if sons, or majority or marriage, if daughters), and in such manner, as their father shall appoint; or, in default of his making any appointment, each such child is to receive an equal portion, which is to be paid under conditions similar to those already stated in the event of there being one such younger

(*q*) See *Hemming* v. *Griffith*, 2 Giff. 403; *Knapp* v. *Knapp*, L. R. 12 Eq. 238.

(*r*) *Windham* v. *Graham*, 1 Russ. 331, 344.

(*s*) *Ellison* v. *Thomas*, 1 De G. J. & S. 18, 27; *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43.

(*t*) *Chadwick* v. *Doleman*, 2 Ver. 527.

child only. It follows that, subject to any appointment by the husband, the time for payment of the portions does not arise until after his death, although the time when they become vested may be earlier in date. In order to prevent any one child from getting an undue share of the portions fund, there comes next a "hotch-pot" clause, providing that no child in whose favour any appointment has been made shall have any share in the unappointed part of the fund, unless he throws into it the share which he has received already, and thus, as it is technically expressed, brings the latter into hotch-pot.

Hotchpot clause.

Of the other trusts of this term, the first provides for the case of the husband's dying before all the younger children have become entitled to their respective portions. It is to the effect that the trustees shall, after the death of the husband, raise a sum out of the rents and profits of the estate, and apply it for the maintenance and education or benefit of such children. The amount of this sum is not to exceed, in the case of any child, what the interest of his or her expectant portion would come to at £4 per cent. per annum, and, subject to this condition, is to be fixed in accordance with the husband's appointment, if he has made any; if he has made none, its amount is left to the discretion of the trustees (*u*). This is followed by a clause which empowers the trustees, after the death of the husband, or on his written request during his lifetime, to raise a sum not exceeding one-half of the then expectant or presumptive portion of any child, and apply the same for the advancement of the child, as the husband, during his lifetime, or the trustees, after his death, shall think fit. The advancement

Trust for maintenance.

Advancement clause.

(*u*) Under the Conveyancing Act, 1881, s. 43, the maintenance clause is not necessary when a fund producing income is settled on children contingently on their attaining twenty-one or on the occurrence of any event before their attaining that age, but a portions fund can produce no income until it is raised, and it cannot be raised until the child has reached twenty-one, or, in the case of a daughter, has reached twenty-one or married. Therefore to provide maintenance the express clause must be inserted in strict settlements of land. Having regard to the increased expenses of living and the general rise in the rate of interest due to the recent war, it is probable that future settlements may provide maintenance at the rate of 5 per cent. on the expectant portion.

clause ends with a proviso that no advancement shall be deemed to be part of the amount raisable for portions, unless the child in whose favour it is made becomes afterwards competent to take a portion; or unless the sums advanced would, together with those still to be raised, exceed the *maximum* amount allowed by the settlement for portions, in which latter case the sums still raisable are to be reduced by the amount of such excess. The object of this proviso is to throw any advance made to a son who afterwards dies before attaining twenty-one upon the estate, and not upon the portions fund, so long as the limit fixed for portions is not in any case exceeded: thus enlarging, to a certain extent, the scope of the clause which charges the estate only in favour of children who may attain their majority, or marry, as the case may be.

Proviso for raising portions during the husband's lifetime.

A further proviso enables the husband to require the trustees to raise, in his lifetime, the whole or part of the portion in which any child has acquired a vested interest: but the trustees may in such a case, at their option, instead of actually raising any portion, mortgage a sufficient part of the property to the child by way of security for it, and pay him, or her, interest on such mortgage, so as to provide an income in lieu of that which would otherwise be derived from the severed portion. They may also, if they think fit, include in such mortgage the husband's life interest in the estate, in which case he will be bound to keep down the interest on the sum so raised; receiving the surplus income only, after providing for all the expenses incurred by the trustees in the execution of their trust.

Sometimes an express power is given to the owner of the estate for the time being to have the total sum that can be raised for portions raised as soon as the first portion becomes payable, for otherwise the trustees may be obliged to make as many mortgages as there are portions. It is doubtful if, in the absence of such express provision, the whole of the portions could be raised at once (*v*).

(*v*) *Sheppard* v. *Wilson*, 4 Hare 392; Elph. Conv. 484-5.

Surplus rents and profits to be taken by reversioner.

The settlement then provides that, subject to the trusts declared and subject to the right of the trustees by any of the ways and means aforesaid to raise and reimburse themselves all costs and expenses incurred in relation to the trusts, the surplus of the rents and profits of the premises comprised in the long term shall be received by the person or persons for the time being entitled in reversion immediately expectant on the said term.

Formerly a proviso was inserted for the cesser of the term as soon as the trusts were fulfilled, but this is now unnecessary owing to the provisions of the Satisfied Terms Act, 1845 (*w*).

Appointment of trustees for the purposes of the Conveyancing Act, 1881, and Settled Land Act, 1882.

Formerly it was necessary to give the trustees powers for the management of the estate, and application of the rents, in the event of the next succeeding tenant in tail being an infant at the time of the husband's death. These, however, have been rendered unnecessary, in the case of a settlement made after the 31st December, 1881, by the Conveyancing Act of that year, which, as amended by the Conveyancing Act, 1911, s. 14, enacts (*x*) that if and so long as any person who would, but for the enactment, be beneficially entitled to the possession of any land is an infant, the trustees appointed for that purpose by the settlement may enter into possession of the lands, and, in that case, shall have the large powers enumerated in the Act for dealing with the land in a proper and due course of management; paying their expenses thus incurred out of the income, applying such part of the rest of it as they may think fit for the maintenance or education of the infant, and investing the residue and accumulating it at compound interest in trust for the infant on attaining twenty-one years, or if a female attaining that age or marrying; failing which the fund is to be held in trust for the persons designated by the settlement. And the Settled Land Act, 1882 (*y*), has given to every tenant for life of land under a

(*w*) 8 & 9 Vict. c. 112.
(*x*) 44 & 45 Vict. c. 41, s. 41.
(*y*) 45 & 46 Vict. c. 38.

settlement, full powers of disposition over the settled estate, the only check (if such it can be called) upon his exercise of them being that he must (*z*) give previous notice to the trustees of the settlement, of whom there must be at least two, unless the settlement provides otherwise (*a*), and who will, ordinarily, receive any proceeds of sale or other capital money produced by the exercise of his powers, and invest it for the benefit of the persons for the time being entitled to the land. Hence all that is requisite at the present day, instead of the powers of management, &c., formerly given to the trustees, is to appoint them trustees for the purposes of the two Acts; and, if so desired, to declare that their powers under the Settled Land Act, 1882, may be exercised by a sole trustee. It may be added that the last-mentioned Act (*b*) enables the trustees, during the minority of an infant tenant in tail in possession, to exercise on his behalf all the powers conferred by the Act on a tenant for life.

Power to husband to jointure future wife.

And to charge portions for children of future marriage.

After these clauses come others, whereby the husband is enabled to appoint, in favour of any future wife, a rent charge of a specified amount by way of jointure. He is also empowered, in the event of his marrying again, to charge the estate with portions for the children of any future marriage, under conditions similar to those already stated in the case of his having younger children by his first marriage; and with the usual maintenance and advancement clauses.

Additional powers.

These clauses are sometimes followed by others enlarging the powers conferred on the tenant for life by the Settled Land Act. For instance, that Act does not enable a tenant for life to sell or lease the principal mansion-house on the property, or any lands usually held therewith, without the consent of the trustees, or an order of the Court, unless the settlement expressly authorizes him so to do (*c*). And it is sometimes desired that he should have this power. Also it is not unusual to insert a clause enabling any capital

(*z*) S. 45. (*a*) S. 39. (*b*) S. 60.
(*c*) 45 & 46 Vict. c. 38, s. 15.

money which may become subject to the trusts of the settlement to be invested in a greater variety of securities than those mentioned in the Act.

Power of appointing new trustees.

Next comes a clause which relates to the appointment of new trustees of the settlement. Under the Trustee Act, 1893, s. 10 (re-enacting section 31 of the Conveyancing Act, 1881) (*d*), where a trustee, either original or substituted, and whether appointed by the Court or otherwise, is dead or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses, or is unfit, or incapable, to act therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such persons able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may appoint a new trustee or new trustees. It is generally considered desirable that the appointment of new trustees should rest with the person, if of full age, who for the time being is entitled to the possession or to the receipt of the rents and profits of the land. The clause in question therefore declares that such person shall have power to appoint a new trustee or new trustees of the settlement. The deed sometimes contains a proviso that the settlement shall be altogether void unless the marriage is solemnized within a specified time. It concludes with the ordinary Testimonium clause.

II. Strict Settlements of Copyholds, Leaseholds and Chattels.

It will be noticed that, in a strict settlement of freeholds made on marriage, the legal estate is transferred to the husband for life, and the remainder to the eldest son is, at the date of the marriage, a legal contingent remainder, becoming vested when a son is born: the legal estate passing by virtue

(*d*) 56 & 57 Vict. c. 53, s. 10.

of the Statute of Uses, the land being limited to the trustees to the use of the husband, etc. The Statute of Uses does not apply to settlements of copyholds or personalty; and, at common law, personalty could not be limited to persons in succession. Moreover there is no estate tail in copyholds except by special custom of the manor and there cannot be a fee tail in personalty. The form of a settlement of copyholds and leaseholds and chattels differs therefore from that of a settlement of freeholds.

A strict settlement sometimes includes freeholds, copyholds, leaseholds and personal chattels (which chattels, when settled so as to accompany freeholds in strict settlement are sometimes, though incorrectly, termed "heirlooms").

Settlement of copyholds.

If the settlement includes copyholds, the settlor should covenant to surrender the copyholds to the use of the trustees upon such trusts and with and subject to such powers as shall correspond with the uses declared concerning the freeholds as nearly as the different quality of the estates and the rules of law and equity will permit, but not so as to increase charges and powers of charging, and the settlor should covenant to stand possessed of the copyholds, until the surrender, upon the same trusts as if the same had been actually surrendered (*e*).

Settlement of leaseholds and chattels.

Leaseholds and chattels are assigned to the trustees upon such trusts as shall most nearly correspond to the uses of the freeholds, provided that the leaseholds and chattels shall not vest absolutely in any person made tenant in tail by purchase unless he attain the age of twenty-one years, but on his death under age shall devolve as if they had been freeholds of inheritance included in the settlement. Words of limitation which would create a fee-simple or fee-tail in realty will convey the absolute interest in personalty. Hence, if the vesting were not postponed until the tenant

(*e*) Elph. Conv. 508.

in tail of the freeholds attain twenty-one, the settled leaseholds and chattels would vest absolutely in the first tenant in tail on his birth, and on his death under age (as he could not make a will or resettlement until he attained twenty-one), they would pass to his administrator for his next-of-kin and not to the tenant of the freeholds under the settlement. The words " by purchase " are a technical term in this connection, and imply a tenant in tail taking *directly* by the settlement, which in the case of a marriage settlement on the husband for life, remainder to his sons, successively in tail, remainder to his daughters as tenants in common in tail, would be a son or daughter, *i.e.*, a tenant in tail who will be the child of a person living at the date of the settlement. If the direction in the settlement were not so restricted, it might (unless the context showed that the tenants in tail referred to are tenants in tail by purchase only) be held to apply to *all* tenants in tail, including those becoming tenants in tail by descent, and it would then be void for remoteness as offending the rule against perpetuities (*f*). If the settlement is in the ordinary form, every tenant in tail by purchase will be the child of a living person, and therefore the gift over of the leaseholds and chattels is not too remote, and they will on his death under twenty-one devolve on the person who succeeds to the freeholds. If he attains twenty-one, they will vest absolutely in him and on his death will pass under his will or intestacy, unless the settlement shows clearly that he is not to be absolutely entitled to them until he comes into actual possession of the estate. Sometimes, therefore, the settlement provides that the leaseholds and chattels shall not vest absolutely in any tenant in tail by purchase who (1) dies under the age of twenty-one, or (2) dies before he becomes entitled to the actual possession or receipt of the rents and profits of the leaseholds, or (3) dies before the expiration of twenty-one years from the determination of all estates for life preceding his estate in tail without, in either of the last two cases,

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(*f*) Elph. Conv. 494, 508; *Martelli* v. *Holloway*, L. R. 5 H. L. 532; *In re Atkinson* [1916] 1 Ch. 91.

having with the consent of the protector, if any, either barred the entail in the freehold or declared by deed that the leaseholds and chattels should vest in him absolutely; but on his death without having acquired a vested interest in the leaseholds and chattels they shall devolve as if they had been freeholds of inheritance included in the settlement (*g*). In a settlement created by will a life estate is sometimes granted to an unborn person with remainders over. In such a case the second and more complex form of settlement of leaseholds and chattels should not be employed, as it would be void for remoteness (*h*).

Sale of quasi-heirlooms.

Chattels settled to run with freeholds, or "modern heirlooms" as they are sometimes termed, can be sold by order of the Court under the Settled Land Act, 1882 (*i*), whatever may be the date of the settlement (*j*). The tenant for life in possession of the freeholds can sell such chattels on obtaining an order of the Court. The money arising from the sale will be capital money and may be invested or dealt with in the purchase of other chattels which, when purchased, must be settled and held on the same trusts and will devolve in the same manner as the chattels sold. The Court will not make the order for sale unless a sale is proved to be for the benefit, not only of the tenant for life, but also of the other persons entitled under the settlement (*k*).

Inventory and insurance of quasi-heirlooms.

Provision is sometimes made that an inventory shall be made of such chattels, such inventory to be signed by every person for the time being entitled to the enjoyment of the same articles under the trust, if and when of full age, and also by the trustees, and that the said articles shall be kept insured against loss or damage by fire or burglary and pro-

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(*g*) Elph. Conv. 509; *Re Angerstein* [1895] 2 Ch. 883; *Re Fothergill* [1903] 1 Ch. 149; *Re Petre's Settlement* [1910] 1 Ch. 290; *Re Lewis's Will Trusts* [1918] 2 Ch. 308.

(*h*) Elph. Conv. 510.

(*i*) 45 & 46 Vict. c. 38, s. 37.

(*j*) *Re Lord Stafford's Settlement and Will* [1904] 2 Ch. 72.

(*k*) *Re Hope* (1910) 26 T. L. R. 413; *Re Sebright* (1912) 28 T. L. R. 191.

perly preserved by and at the expense of the person enjoying the life interest therein; and the settlement provides that after the inventory has been signed as aforesaid, the trustees shall not be liable to see to the insurance or preservation of the property, and shall not be responsible for any omission or neglect on the part of the person enjoying the life interest with respect to the insurance or preservation thereof, nor for loss or damage occasioned by any other act or omission on his part, but that the trustees shall notwithstanding have the right to interfere for the protection of the property when and as they shall think fit (*l*).

III. Resettlement.

When land has been settled on A for life, remainder to his first and other sons successively in tail, etc., it is the custom, when the first tenant in tail reaches the age of twenty-one in the lifetime of the father, to execute a disentailing deed and resettlement, partly with the object of tying up the land for another generation, and partly, also, to provide an income for the son during his father's lifetime and to make provision for the son's wife and younger children in the event of his marriage while his father is still alive.

The disentailing deed and resettlement could be carried into effect by one deed; but, in practice, two deeds are employed: the disentailing deed, limiting the property to such uses as the father and son shall jointly appoint (*m*), and the deed of resettlement (*mm*). The disentailing deed is then enrolled under the Fines and Recoveries Act, 1833 (*n*). The statutory powers of the father as a tenant for life under the Settled Land Acts, 1882-90, will remain notwithstanding any assignment; but some of the powers given to him in the original settlement, such as the power to jointure and to charge portions, being express powers in gross, could not (but for the provision hereinafter referred to), be exercised after he has concurred in a resettlement; and other powers con-

(*l*) Dav. Con. Prec. 659.
(*mm*) Elph. Conv. 640.
(*m*) Precedent XXXVIII.
(*n*) 3 & 4 Will. 4, c. 74.

tained in the original settlement, such as express powers of leasing, being express powers appendant, could not be exercised after he has alienated or charged his life estate without the consent of the alienee or the person entitled to the charge, unless the right of the father to exercise such powers are expressly or impliedly reserved at the time when the resettlement or charge is effected. If, by the resettlement, the son is given an annuity and his intended wife is given pin-money, the son and his intended wife will be incumbrancers on the father's life estate and therefore it would be necessary for them to concur in every exercise of the powers appendant to the father's life estate (other than the statutory powers given by the Settled Land Acts), unless the right of exercising such powers without their concurrence was reserved to him (*nn*). Therefore it is the practice to limit to the father in the resettlement an estate for life "in restoration and by way of confirmation of his life estate" under the original settlement and to declare expressly in the resettlement that the powers exercisable by the father as tenant for life, under the original settlement, are to remain exercisable. The powers conferred by the Settled Land Acts, 1882-90, on a tenant for life are indestructible and after a resettlement can be exercised by him whether his life estate under the original settlement is or is not restored. The question arose whether, if the words "in restoration of his life estate" were employed in the resettlement, the tenant for life could be a tenant for life under the *resettlement* and exercise the statutory and other powers conferred by it. In a recent case (*o*) it has been held that when a resettlement gives a life estate to the original tenant for life in restoration of his life estate under the original settlement, the words "in restoration, etc.," are inserted merely to show an intent to keep alive the old powers of the original settlement; that the words do not in fact actually restore the original life estate; that the tenant for life is, therefore, tenant for life under the resettlement of the property thereby settled and can exercise over that property the

(*nn*) Elph. Conv. 641. (*o*) *Re Constable* [1919] 1 Ch. 178.

powers of the Settled Land Acts, 1882-90, and any extended powers conferred by the resettlement.

Form of resettlement.

The resettlement contains recitals of the original settlement, the interim dealings with the property, the state of the family, the disentailing assurance and the agreement for the resettlement; and the operative part consists of a joint appointment by the father and son to the uses thereinafter declared, namely, to the use that the son shall, during the joint lives of the father and son, take a rent charge of so much a year and subject thereto to the use of the father for life in restoration of his life estate under the original settlement and of all powers of jointuring and charging portions annexed to or exercised during such life estate, with remainder to the son for life, with remainder to his sons successively in tail, with remainders over. Powers are given to the son to limit a jointure rent charge in favour of any wife whom he may marry and to charge portions in favour of the son's younger children and to limit a term of years to secure them (*p*).

IV. Settled Land Acts, 1882-90.

The student will remember, from his reading of the general principles of real property, that, if land is granted to A in fee-simple, A can sell the land; and that, if land is granted to A in tail, A can bar the entail, turn his fee tail into a fee-simple and sell the land. It became the practice, therefore, for those who wished to keep land in one family to resort to the system of strict settlement and to tie up the land in the method described above. The land being settled on A for life, A could not, at common law, sell the fee-simple, although he could of course sell his life estate. In a strict settlement, as we have seen, there is a remainder in tail to the son, and, if no further settlement were made and the son survived the father, the son would become tenant in tail in possession, and could, if or when twenty-one years of age, bar the entail and turn his estate into a

(*p*) Elph. Conv. 643-4; Dav. Con. Prec. 578.

complete fee-simple. If he attained the age of twenty-one in his father's lifetime, he could, without his father's consent, bar the entail and create a base fee. To prevent this, *a resettlement* was, and is, usually made on the son reaching the age of twenty-one. The estate tail is barred by the son with the consent of the protector of the original settlement (who would usually be the father), and then the land is resettled in the mode described above, the father's original life estate being restored, remainder to the son for life, remainder to the son's son in tail, etc. This process of resettlement is repeated every generation, the son usually consenting to give up his fee tail remainder and to accept a life estate in remainder instead, partly because he receives an immediate income during the rest of his father's lifetime in the form of an annuity charged on the settled estates, but chiefly because he knows it is the family custom to enter into these arrangements and it is not very probable that he will refuse to fall in with his father's wishes on such a matter. But this practice of settlement and resettlement brought about the result that a great part of the land of the country was tied up in the hands of *limited owners*. Various ill-effects ensued. Tenants for life were not always willing to spend their own money on improvements to property in which they had only a life interest, and in many cases their income was not sufficient to provide them with a margin to expend even if they were willing to do so. No part of the land could be sold to raise cash for necessary improvements, nor could the tenant for life mortgage the fee-simple for the same purpose. Consequently the property deteriorated in value and not only the particular family but the general interests of the community suffered in consequence. Moreover the settlement imposed restrictions on the free alienation of land, thereby checking development of the property by the enterprise and capital of others. The settlement itself sometimes attempted to meet these drawbacks by giving the tenant for life wide powers of selling and leasing, and in the years 1856 (*q*) and

(*q*) 19 & 20 Vict. c. 120.

1877 (*r*) statutes were passed to confer such powers on all life tenants. The Act of 1877 is still in force and is still resorted to when a dower tenant wishes to grant a lease not exceeding twenty-one years, as she has powers to do so under that Act, but has not the powers of the Settled Land Acts, 1882-90. But the main Act governing the powers of tenants for life and other limited owners is now the Settled Land Act, 1882 (*s*), as amended by subsequent Acts of 1884, 1887, 1889, and 1890, the various Acts being cited together as the Settled Land Acts, 1882-90. Put shortly, the purpose of the Acts was to give a tenant for life under a settlement very wide powers of disposition over the property settled, not only without the consent of the settlor or any other person interested in the settlement, but even in spite of any attempt by the settlor to prevent him from exercising such powers. The object of the Settled Land Act, it has been said (*t*), is to render land a marketable article notwithstanding the settlement. Thus a tenant for life under a settlement can grant leases which will be binding on his successors and can even sell the fee-simple. At the same time the material interests of all those entitled under the settlement are preserved by the provisions of the Acts, as set out more fully below. If, for example, the tenant for life sells any part of the land, the purchase money is "capital money," and is paid to the trustees of the settlement or into Court and invested, and held subject to the same trusts and limitations as bound the original settled land, the tenant for life taking merely the income thereof. Most of the statutory powers can be exercised only after notice is given to the trustees of the settlement, and some only with their consent or under an order of Court. These statutory powers are imported into every settlement, whether made before or after the passing of the Settled Land Act, 1882, and are not in substitution for powers expressly given in the settlement, but in addition to such express powers. If, however, there should be any conflict between

Settled Land Acts, 1882-90.

(*r*) Settled Estates Act, 1877, 40 & 41 Vict. c. 18.
(*s*) 45 & 46 Vict. c. 38.
(*t*) Chitty, L.J., in *Re Mundy and Roper's Contract* [1899] 1 Ch. 275.

the provisions of a settlement and those of the Act as to such powers, the provisions of the Act are to prevail, so that the consent of the tenant for life is necessary to the exercise of any express power conferred on the trustees exercisable for any purpose provided for by the Act, *e.g.*, an express power of sale. If two or more persons constitute the tenant for life (*e.g.*, joint tenants), the consent of any one of them is sufficient (*u*).

In summarising the more important provisions of the Settled Land Acts, 1882-90, it is necessary first to explain the meanings of "settlement," "settled land," "tenant for life" and "trustees of the settlement" as used in the Acts.

"Settlement." "Settlement" is defined in the Settled Land Act, 1882, s. 2 (1), so as to include every deed, will, agreement for a settlement, covenant to surrender or other instrument or any number of instruments, whether made before or after, or partly before and partly after, the commencement of the Act, under or by virtue of which any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession.

The expression "by way of succession" has been held to mean "successively on death" (*v*). An instrument charging land with payment on death of any person of a jointure or portions is a settlement (*w*). If by a marriage settlement land is settled on settlor for life with jointure for his widow and portions for his children, remainder to settlor in fee-simple, this is a "settlement" within the meaning of the Act notwithstanding the merger of the life estate in the fee-simple remainder (*x*). If A settles land on B for life, the reversion remaining in A, B is a tenant for life under "a settlement" (*y*). But if land is settled on A for

(*u*) Settled Land Act, 1884, s. 6 (2).
(*v*) *Re Campbell* [1902] 1 K. B. 113.
(*w*) *Re Mundy and Roper* [1899] 1 Ch. 275.
(*x*) *Re Marshall* [1905] 2 Ch. 325.
(*y*) *Re Hunter and Hewlett's Contract* [1907] 1 Ch. 46.

life, remainder to B in fee-simple, with power to A to charge jointure and portions in favour of his widow and younger children, and A dies having exercised the power, the land becomes vested in B in fee-simple subject to jointure and portions charges which take effect at the same time, and therefore, after the death of A, there is no longer any settlement within the meaning of the Act (*z*). An instrument limiting land to A for life and then to such uses as A shall appoint is not a settlement within the meaning of the Act.

Compound settlement.

A settlement which is constituted by more than one instrument is termed a compound settlement, *e.g.*, a strict settlement containing the usual powers of jointuring and limiting terms for portions, a deed charging the jointure, a disentailing deed and a resettlement, being all connected together, may be treated as one compound settlement (*a*).

Settled land.

"Settled land" is defined by the Settled Land Act, 1882, s. 2 (3) to be "land and any estate or interest therein which is the subject of a settlement." "Settled land" (1) would include leaseholds and copyholds, and incorporeal hereditaments, such as advowsons; (2) would include the legal estate in the land, if that is settled, and in such a case the powers of the Settled Land Acts exercisable over "the settled land" bind the legal estate, even if it be vested in a trustee; for example, if the legal estate in land is vested in trustees in trust for A for life, etc., A can convey a legal interest. But the tenant for life cannot affect any interest in the land greater than that settled. Thus if X, a tenant in fee-simple, mortgaged the land to B by legal mortgage, and then settled his equity of redemption on A for life, etc., A could grant a lease of the equitable interest in the land under the Settled Land Acts, but if he wished to bind the legal estate vested in B, the lease must be made in accordance with the provisions of the Conveyancing Act, 1881 (*b*). If a leasehold is settled on trustees in trust for A for life, etc., A

(*z*) Elph. Conv. 514.
(*a*) *Re Marquis of Ailesbury and Lord Iveagh* [1893] 2 Ch. 345.
(*b*) See above p. 154; Elph. Conv. 518.

could sell the lease, but he could not sell the fee-simple reversion.

Tenant for life.

The tenant for life is defined by the Settled Land Act, 1882, s. 2 (5) as "the person who is for the time being under a settlement beneficially entitled to the possession of settled land for his life." This definition includes all tenants for life, whether legal or equitable. If two or more persons are so entitled as tenants in common or joint tenants, or for other concurrent interests, they together constitute the tenant for life.

Trustees of the settlement for the purpose of the Settled Land Acts.

"Trustees of the settlement" for the purposes of the Settled Land Acts are "the persons, if any, who are for the time being trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale; or, if under a settlement there are no such trustees, then the persons, if any, who are by the settlement declared to be the trustees thereof for the purposes of the Settled Land Act." (*c*). If there are no such persons, then, by the Settled Land Act, 1890, s. 16, the following are to be trustees of the settlement:—(i) persons who are for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale; or if there be no such persons, then (ii) the persons who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, whether the power or trust takes effect in all events or not. If there were originally no trustees of the settlement within the meaning of the Settled Land Acts (as where the settlement was made before the passing of the Act of 1882, and no trustees with power of sale, etc., were appointed or where the settlement was made after the

(*c*) Settled Land Act, 1882, s. 2 (8).

passing of the Act and did not contain an appointment of trustees "for the purposes of the Settled Land Acts, 1882-90" nor appoint trustees with a power of sale, etc.), then the Court may, on the application of the tenant for life, or some other person interested under the settlement, appoint trustees for the purposes of the Settled Land Acts (*d*). If there were originally trustees within the meaning of the Settled Land Acts, but such trustees fail, then new trustees can be appointed under the power in the settlement or the Trustee Act, 1893, or the Court may appoint trustees of the settlement for the purposes of the Settled Land Acts. "Capital money" is not to be paid to a sole trustee unless this is authorised by the settlement (*e*); but it may be paid to the Public Trustee acting as sole trustee (*f*).

Powers of a tenant for life under the Settled Land Acts, 1882-90.

The powers conferred by the Settled Land Acts on a tenant for life include (1) power to sell the settled land or any part thereof; (2) power to enfranchise copyholds; (3) power to exchange; (4) power to partition; (5) power to grant leases; (6) power to accept a surrender of a lease; (7) power to mortgage the settled land to raise money required for enfranchisement or equality of exchange or partition, etc.; (8) power by deed to convey the settled land, including copyholds or leaseholds vested in trustees, and to convey or create easements, to carry out any sale, exchange, partition, lease or mortgage; (9) power to make, vary and rescind contracts, to make any sale, exchange, partition or lease so as to bind the remaindermen; (10) power to cut and sell timber although impeachable for waste; (11) power to sell heirlooms, but not without an order of the Court; (12) power, under certain restrictions referred to below, to make improvements on the settled land and to have them paid for out of capital money (*g*).

(*d*) Settled Land Act, 1882, s. 38. (*e*) *Ibid.* s. 39.
(*f*) *Re Leslie's Hassop Estate* [1911] 1 Ch. 611.
(*g*) Elph. Conv. 533-6; Settled Land Act, 1882, s. 3, *et seq.*

Power of sale.

The tenant for life may sell the settled land or any part thereof. The sale may be made in one lot or in several lots, and either by auction or by private contract. He may make conditions as to the title, uses of the land, mines and minerals. The sale should be at the best price that can reasonably be obtained; and the purchase money must be paid, at the option of the tenant for life, either to the trustees of the settlement or into Court. The purchase money is "capital money," and may be invested in trust securities, in which case the tenant for life receives the income thereof, the capital being considered as land and going to the same persons successively, in the same manner and for and on the same estates, interests and trusts, as the land whereupon the money arises would, if not disposed of, have been held and have gone under the settlement; or it may be dealt with in other ways, *e.g.*, in discharging mortgages on the fee-simple of the settled land or in payment for any improvements authorised by the Act. Thus if land has been settled on A for life, remainder to B in tail, remainder to C in fee-simple, and A sells the fee-simple, under the Settled Land Acts, 1882-90, and the purchase money is paid to trustees and invested, A would receive the income of such investments during the rest of his life, and on A's death, if B survived A and desired to claim the capital money from the trustees, B would have to bar the entail. Until the entail has been barred, B, on A's death, is entitled to the income only. If B should die without issue before A, and the entail has not been barred with the consent of the protector of the settlement, C, if of age, can claim the capital money from the trustees on the death of A. If B survives A, but dies without issue and without having barred the entail, C, if of age, can claim the capital money from the trustees on B's death.

The tenant for life, before exercising his power of sale, must give not less than one month's notice to each of the trustees of the settlement and to their solicitor (if he knows of such solicitor), by registered letters, of his intention to

make a sale. The number of trustees at the time of the notice must be not less than two, unless a contrary intention is expressed in the settlement, or unless the one trustee is the Public Trustee (*h*). A purchaser dealing in good faith with the tenant for life is not concerned to inquire whether due notice has been given, but before completing the sale he must ascertain whether there are duly appointed trustees for the purposes of the Settled Land Acts. The notice may be of a general intention to sell; and the trustees may waive notice or accept less than one month's notice (*i*).

The tenant for life cannot sell the principal mansion-house and the pleasure grounds and park and lands (if any) usually occupied therewith without the consent of the trustees or an order of the Court. But where a house is usually occupied as a farmhouse, or where the site of the house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres, the house is not a principal mansion-house within this provision (*j*).

Power to exchange.

The tenant for life can exchange the settled land, or any part thereof, for other land, and take or give money for equality of exchange. Notice must be given to the trustees, and their consent must be obtained if the principal mansion-house is to be exchanged. The exchange must be for the best consideration in land, or in land and money, that can reasonably be obtained. Settled land in England must not be given in exchange for land out of England (*k*).

Shifting incumbrances.

If the land sold or exchanged is subject to an incumbrance, the tenant for life may, with the consent of the incumbrancers, charge it on any other part of the settled land in exoneration of the land sold or exchanged (*l*).

(*h*) Settled Land Act, 1882, s. 45; Public Trustee Act, 1906, s. 5.
(*i*) Settled Land Act, 1884, s. 5 (1).
(*j*) Settled Land Act, 1890, s. 10.
(*k*) Settled Land Act, 1882, ss. 3, 4.
(*l*) *Ibid.* s. 5.

Power to grant leases.

A tenant for life can grant leases of the settled land, or of part thereof, or of any easement, right, or privilege over it, whether involving waste or not, for any term not exceeding ninety-nine years for a building lease, sixty years for a mining lease, and twenty-one years for any other lease (*m*). A building or mining lease may, with consent of the Court, be extended to lease in perpetuity (*n*). A building lease may contain an option for the lessee to purchase the land (*o*). It would appear that an ordinary repairing lease is not a "building lease" within the meaning of the Settled Land Act. The erecting or repairing of buildings must be the purpose or one of the purposes for which the lease is granted. Leases granted under the Settled Land Acts are subject to the following conditions: (1) The lease must be by deed (with the exception of certain leases not exceeding three years, see below); (2) the lease must take effect in possession not later than twelve months after its date; (3) the rent must be the best that can reasonably be obtained, having regard to any fine that is taken, etc.; (4) the lease must contain a covenant by the lessee for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days; (5) a counterpart is to be executed by the lessee and delivered to the tenant for life; but the execution of the lease by the tenant for life is sufficient evidence of this having been done (*p*).

Notice must be given to the trustees of the intention to grant a lease (with the exception stated below), and the principal mansion-house cannot be let on lease without the consent of the trustees or of the Court.

(*m*) Settled Land Act, 1882, s. 6; *Re Daniell's Settled Estates* [1894] 3 Ch. 503. Under the Housing, Town Planning, etc., Act, 1909, s. 31, a tenant for life may make grants or leases for any term of years for a nominal price or rent or for less than the best price or rent for erection of dwellings for working classes or provision of gardens connected therewith with a limit of two acres in an urban district and ten acres in a rural district for such buildings or gardens in any one parish except under order of the Court.

(*n*) Settled Land Act, 1882, s. 10.

(*o*) Settled Land Act, 1889, s. 2.

(*p*) Settled Land Act, 1882, s. 7.

A lease for a term not exceeding twenty-one years at the best rent that can reasonably be obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life, notwithstanding that no notice is given to the trustees by the tenant for life, or that there are no trustees of the settlement for the purpose of the Settled Land Acts; and such a lease may be made by writing under hand only where the term does not exceed three years from the date of the writing (*q*).

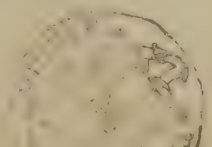
Building and mining leases.

In addition to the above, certain special provisions apply to building and mining leases. Thus in a building lease a peppercorn rent may be reserved during the first five years or any less part of the term (*r*). If a mining lease is granted, unless a contrary intention is expressed in the settlement, three-fourths of the rent, if the tenant for life is impeachable for waste in respect of minerals, and one-fourth if he is not, is to be set aside as capital money (*s*). A tenant for life who is impeachable for waste may work mines which are already open, and therefore he is in the same position as to such mines as if he were not impeachable for waste, and if he grants a lease of them under the Settled Land Acts, only one-fourth of the income has to be set aside (*t*).

Surrender of leases.

A tenant for life has power to accept, with or without consideration, a surrender of any lease of settled land (*u*). If the tenant for life is an equitable tenant for life and the lessee pays a sum of money for being allowed to surrender, such sum must be paid to the trustees and must be paid out by instalments to the persons successively entitled during the period for which the surrendered lease would have lasted, *e.g.*, if ten years were left of the lease, and the lessee paid £1,000, the trustees should pay to the tenant for life £100 a year (*v*).

(*q*) Settled Land Act, 1890, s. 7.
(*r*) Settled Land Act, 1882, s. 8.
(*s*) *Ibid.* s. 11.
(*t*) Elph. Conv. 542; *Re Chaytor* [1900] 2 Ch. 804.
(*u*) Settled Land Act, 1882, s. 13.
(*v*) *Re Rodes* [1909] 1 Ch. 815. A legal tenant for life would, as a rule, be entitled to the whole sum as income.



If the tenant for life makes a new lease on the surrender of an existing lease, he may take into account the value of the surrendered lease. If the new lease is granted at an increased rent, the tenant for life will be entitled to the benefit of the excess rent during the whole period of the new lease (*w*).

A tenant for life may carry into effect a contract for a lease entered into by his predecessor in title. Hence if a tenant in fee-simple has contracted to grant a mining lease of an unopened mine, and dies before the lease is actually granted, the tenant for life under his will, though impeachable for waste, is entitled to all the rent paid after the lease has been executed (*x*).

Power to mortgage.

Under the Settled Land Act, 1882, a tenant for life can mortgage the settled land for the purpose of raising money for an enfranchisement, or equality of exchange or partition (*y*), or payment of costs ordered by the Court to be paid out of settled property (*z*). Under the Settled Land Act, 1890, a tenant for life can mortgage the settled land, for the purpose of paying off incumbrances on the settled land (*a*). Under the Housing, Town Planning, etc., Act, 1919 (*b*), a tenant for life can mortgage the settled land to raise money for the provision of dwellings available for the working classes. A tenant for life who desires to exercise his powers of mortgaging must give notice of his intention to the trustees, and such notice must be a specific notice; a general notice (as in the case of an intention to sell, or lease) is not sufficient. The money raised should be paid to the trustees and applied by them for the above purposes. The trustees should concur in the mortgage to give a receipt in any case, even if the money is not actually

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(*w*) *Re Wix* [1916] 1 Ch. 279.
(*x*) Settled Land Act, 1882, s. 12; *Re Kemeys-Tynte* [1892] 2 Ch. 211.
(*y*) *Ibid.* s. 18.
(*z*) *Ibid.* s. 47.
(*a*) Settled Land Act, 1890, s. 11.
(*b*) 9 & 10 Geo. 5, c. 35, s. 31.

paid to them, *e.g.*, where the money raised is to be paid direct to a former mortgagee in discharge of his mortgage.

Power to cut timber.

Apart from the Settled Land Acts, a tenant for life who under the settlement is declared not to be impeachable for waste can cut and sell timber (except timber planted for ornamental purposes) and keep all the proceeds for himself. The Settled Land Act, 1882, provides (*c*) that where a tenant for life is impeachable for waste in respect of timber, he may, whether the settlement was made after 1882 or not, with the consent of the trustees or an order of Court, cut and sell timber ripe for cutting; but three-fourths of the net proceeds of the sale are to be set aside as capital money, and the other one-fourth to go as rents and profits.

Power to sell heirlooms.

Personal chattels settled to accompany the inheritance (*i.e.*, quasi-heirlooms but frequently termed "heirlooms") can be sold by a tenant for life of the settled land (*d*). Leave of the Court is required, and the Court will not make the order unless it is proved that a sale will be for the benefit not only of the tenant for life, but also of those who will succeed to him under the settlement (*e*). The proceeds of sale must be invested as capital money or may be invested in the purchase of other chattels to be settled in the same way as the chattels sold.

Power to make improvements out of capital money.

Where a tenant for life desires capital money to be applied in making improvements on the settled land, he should draw up a scheme of the proposed improvements and submit it to the trustees or the Court for approval (*f*). The Court *may*, however, allow capital money to be applied towards improvements, although no scheme was submitted before the execution thereof (*g*). If the capital money is

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(*c*) 45 & 46 Vict. c. 38, s. 35.
(*d*) Settled Land Act, 1882, s. 37.
(*e*) *Re Hope* (1910) 26 T. L. R. 413; *Re Sebright* (1912) 28 T. L. R. 191.
(*f*) Settled Land Act, 1882, s. 26 (1).
(*g*) Settled Land Act, 1890, s. 15; *Re Tucker's Settled Estates* [1895] 2 Ch. 468.

in the hands of trustees, and they approve of the scheme, the trustees may apply capital money in or towards the improvements on (1) a certificate of the Board of Agriculture certifying that the work has been properly executed and what amount is properly payable by the trustees in respect thereof; or on (2) a like certificate of a competent engineer or practical surveyor appointed by the trustees and approved by the Board or by the Court; or on (3) an order of the Court directing or authorising the trustees so to apply a specified portion of the capital money (*h*). If the capital money to be expended is in Court, then after a scheme is approved by the Court, the Court may, on a report or certificate of the Board of Agriculture, or of a competent engineer or practical surveyor approved by the Court, or other evidence, make such order and give such directions as it thinks fit for the application of the money towards the improvement (*i*). Improvements authorised by the Settled Land Act, 1882, include drainage, irrigation, sea-walls, roads, cottages, farmhouses, reservoirs, tramways, railways, gardens, or other open spaces in connection with the conversion of land into building land, etc. (*j*). The Settled Land Act, 1890 (*k*), added: (1) Bridges; (2) making any additions to or alterations in buildings necessary to enable the same to be let; (3) erection of buildings in substitution for buildings taken by a local authority or under compulsory powers; (4) rebuilding the principal mansion-house, provided that the sum to be applied out of capital money shall not exceed one-half of the annual rental of the settled land. But ordinary repairs cannot be paid for out of capital money. Apart from the Settled Land Acts, the Court may allow expenditure out of capital money for salvage, *i.e.*, to preserve property from going to ruin (*l*).

Under the Settled Land Acts there is no power to mortgage the settled land in order to raise money to pay for

(*h*) Settled Land Act, 1882, s. 26 (2).
(*i*) *Ibid.* s. 26 (3).
(*j*) *Ibid.* s. 25.
(*k*) S. 13.
(*l*) *Re De Teissier's Settled Estates* [1893] 1 Ch. 153.

improvements, but this can be done under the Improvement of Land Acts, 1864—1899, by creating a rent charge on the land with the sanction of the Board of Agriculture, and such improvement charges can be redeemed with capital money (*m*).

Capital money.

Money arising through the exercise of the powers given by the Settled Land Acts is termed "capital money." It is paid to the trustees or into Court at the option of the tenant for life. Capital money would include money arising from any sale of settled land, part of the rent received in respect of mining leases granted under the Acts, part of the money received on a sale of timber when the tenant for life is impeachable for waste, money received on a sale of heirlooms, money raised by a mortgage of the settled land by a tenant for life for the purposes mentioned above, a fine reserved on the grant of a lease. Capital money is invested according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees, in any of the various investments set out in the Settled Land Act, 1882, and the capital money while remaining uninvested and the investments thereof are to devolve as land and go to the same persons successively in the same manner as the land from which the money arises would, if not disposed of, have devolved; and the income of the investments is to be applied as the income of the land would have been applicable if it had not been sold (*n*).

But money which does not arise under the Act (*e.g.*, money settled by the creator of a settlement on trust for persons in succession) devolves as personalty, unless subject to an imperative trust for conversion into realty; and this is so notwithstanding the fact that the settlement directs that the money shall be applied as if it were capital money under the Act or shall devolve as realty (*o*). Capital money arising under the Act can be invested in the purchase of land

(*m*) Settled Land Act, 1887, s. 1.
(*n*) Settled Land Act, 1882, s. 22.
(*o*) *Re Aspinall* [1916] 1 Ch. 15.

in fee-simple, but trust moneys not arising under the Act cannot be invested in the purchase of land unless the trust instrument gives the trustees an express power to purchase land.

The Settled Land Act, 1882, s. 21, provides for the investment of capital money. Subject to any claims properly payable out of the money and to its application for any special object for which it was raised, it is to be applied or invested in any of the following modes: (i) In investment in Government securities or other securities authorised by the settlement or by law or bonds, mortgages, debentures or debenture stock of any railway company in the United Kingdom, incorporated by special Act, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares; (ii) the discharge, purchase, or redemption of incumbrances, land tax, etc., on the settled lands; (iii) payment for improvements authorised by the Acts; (iv) payment for equality of exchange or partition; (v) the purchase of the seignory of settled freeholds or the purchase of the fee-simple of settled copyholds; (vi) the purchase of the reversion in fee of settled leaseholds; (vii) the purchase of land in fee-simple, or of copyhold land, or of leasehold land held for sixty years or more unexpired at the time of purchase; (viii) the purchase in fee-simple, or for a term of sixty years or more, of mines and minerals, or of any easement convenient to be held with the settled land; (ix) payment to a person becoming absolutely entitled; (x) payment of costs of or incidental to the exercise of the powers of the Settled Land Acts; (xi) any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Purchase of the fee simple by tenant for life.

Where the trustees of a settlement of land are empowered to sell with the consent of the tenant for life, it has been held that they may sell to him (*p*). And under the Settled Land Act, 1890 (*q*), where a sale of settled land is to be made to

(*p*) *Howard* v. *Ducane*, T. & R. 81.
(*q*) 53 & 54 Vict. c. 69, s. 12.

the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction. But the Settled Land Act, 1890, does not enable the trustees to make a lease of the settled land to the tenant for life.

Estates, interests, and charges affecting the land sold.

The Settled Land Act, 1882, provides (*r*) that a conveyance by deed made by the tenant for life under the statutory powers shall pass the land conveyed discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests and charges subsisting or to arise thereunder; but subject to and with the exception of (i) estates, interests and charges having priority to the settlement; (ii) other estates, interests and charges conveyed or created for securing money actually raised at the date of the deed; (iii) leases, easements, etc., granted or agreed to be granted before the date of the deed for value in money or money's worth under the settlement or any statutory power.

The excepted estates, interests and charges do not include mortgages or charges created by beneficiaries upon their respective estates or interests under the settlement. A conveyance by the tenant for life operating under section 20 will therefore override any mortgage created by the tenant for life upon his life estate or by the remainderman upon his estate in remainder, provided, in the former case, that the consent of the incumbrancer has first been obtained (*s*). Such charges would become charges on the capital money.

(*r*) S. 20 (2).

(*s*) Elph. Conv. 539; *Re Dickin and Kelsall* [1908] 1 Ch. 213; *Re Davies and Kent* [1910] 2 Ch. 35.

Powers not assignable.

The powers of a tenant for life cannot be assigned or released; and they do not pass to a person as being by operation of law or otherwise an assignee of the tenant for life, but remain exercisable by the tenant for life after assignment even if the assignment occurs by operation of law, as by his becoming bankrupt (*t*). Hence neither a purchaser of the life interest nor the trustee in bankruptcy of the tenant for life can exercise the powers. A contract by a tenant for life not to exercise any of his powers under the Settled Land Act is void (*u*). But this section operates without prejudice to the rights of any assignee for value of the interest of the tenant for life, and the assignee's right are not affected without his consent, except that, unless he is actually in possession of the settled land or part thereof, his consent is not necessary for the making by the tenant for life of leases thereof at the best rent that can reasonably be obtained, without fine, and in other respects in conformity with the Act (*v*).

But where the tenant for life, in consideration of marriage, or by way of family arrangement, assigns or charges his life interest, the Settled Land Act, 1890, provides (*w*) that the instrument by which he does so is to be deemed one of the instruments creating the settlement and not as an instrument vesting in any person any right as assignee for value, and therefore the tenant for life is enabled to convey the settled estate discharged from the estate or interest of any person entitled under an assignment of this kind. Although such an assignment forms one of the instruments creating the settlement, it is not such for all purposes, but merely for the purpose of excluding the application of the Settled Land Act, 1882, s. 50 (*x*), and therefore the assignment does

(*t*) Elph. Conv. 519; Settled Land Act, 1882, s. 50 (1).
(*u*) Settled Land Act, 1882, s. 50 (2).
(*v*) *Ibid.* s. 50 (2).
(*w*) Settled Land Act, 1890, s. 4.
(*x*) *Re Du Cane* [1898] 2 Ch. 96; *Re Wimborne and Browne* [1904] 1 Ch. 537.

not make it necessary to appoint trustees of the compound settlement before the tenant for life can exercise his statutory powers.

An example may throw light upon this complicated point. Suppose land to have been settled upon A for life, remainder to his eldest son in tail, etc. A mortgages or sells his life estate to X. This is an assignment under the Settled Land Act, 1882, s. 50, and, therefore, if A desires to sell the fee-simple to B under the Settled Land Act, 1882, he must obtain the consent of X, although it is not necessary for X to *concur* in the conveyance to B, *i.e.*, he need not be an actual party to the conveyance (*y*). But suppose, by way of family arrangement, a resettlement of the land is made when A's eldest son comes of age, under which the land is resettled on A for life, remainder to his eldest son for life, etc., and the resettlement provides that A's son shall have a rent charge to take effect during A's lifetime in priority to A's life estate. This is an assignment under the Settled Land Act, 1890, s. 4. A can sell the land in fee-simple to B under the Settled Land Act, 1882, without the consent of his son; B would take the land free from the rent charge, and B could safely pay the purchase money to the trustees of the original settlement; it would not be necessary to appoint trustees of the compound settlement (*z*).

If after the tenant for life has released his life interest the land remains settled by virtue of the settlement under which he was tenant for life, he can exercise the powers of the Acts. The land remains settled if jointures or portions not already payable are charged by, or if the releasee is tenant for life or in tail under, that settlement; but if the original settlement is spent and the releasee is tenant in fee-simple, the tenant for life cannot exercise his powers after the release, as the land is no longer settled.

(*y*) *Re Dickin and Kelsall* [1908] 1 Ch. 213.
(*z*) Wms. V. & P. 322-4.

Powers not capable of being restrained or excluded.

Every provision attempting by a gift over of settled land, or any other real or personal property, or by means of a condition, or by forfeiture or otherwise, to prevent the tenant for life from exercising his powers under the Settled Land Acts, is void (*a*); and for this purpose an estate limited to him until he exercises such powers continues, notwithstanding an exercise of the power, as long as it would have continued if he had not exercised the power (*b*), and no exercise of such power causes a forfeiture (*c*). Thus if there be a limitation of an estate to A for life, or till he shall alienate his life estate, A can exercise all the powers of the Settled Land Acts, including the power of sale of the settled land, without incurring a forfeiture; *e.g.*, if he sold the fee-simple, he would have a life interest in the purchase money; but, on the other hand, if he sells his *life interest* so as to incur a forfeiture, he is no longer tenant for life within the meaning of the Settled Land Acts (*d*).

Compound settlement.

As stated above, the tenant for life can sell and convey the settled land discharged from all the limitations of the settlement, but subject to estates, interests, and charges having priority to the settlement. It appears, then, that in the common case of a settlement of lands on one for life with remainder in tail followed by a disentailing assurance and a resettlement again limiting a life estate in the lands to the original tenant for life, the following courses are open to him in selling the lands under the Settled Land Acts. First, he may sell as tenant for life under the old settlement, the purchase money being paid to trustees for the purposes of the Settled Land Acts duly appointed under the old settlement. Secondly, he may sell as tenant for life under the compound settlement constituted by the settlement and the resettlement together and convey the whole estate limited by and still subsisting under such compound settlement; but then trustees of the compound settlement

(*a*) Settled Land Act, 1882, s. 51 (1).
(*b*) *Ibid.* s. 51 (2).
(*c*) *Ibid.* s. 52.
(*d*) Elph. Conv. 522; *Gibbons* v. *Gibbons* [1919] 2 Ch. 99, C. A. [1920] 1 Ch. 372.

must first be appointed; and unless all persons beneficially interested be *sui juris* and concur in making the appointment, this can only be done by the Court. Thirdly, he may sell under the resettlement (even though in the resettlement it is stated that the life estate given to him is in restoration of his estate under the original settlement (*e*)) when the trustees of the resettlement may receive the purchase money; but in that case he can only convey the estate which was the subject of the resettlement, and if any estate or interest limited by the original settlement should be still subsisting, the purchaser will take the land subject to such estates and interests unless the persons entitled thereto concur in the conveyance to the purchaser in order to release the same (*f*). Where land has been settled on A for life, with power for A to secure a jointure for his wife and portions for his younger children, remainder to A's eldest son in tail, etc., and A has charged the land with the jointure and portions, and a resettlement has subsequently been made on A for life, remainder to A's eldest son for life, etc., and A is dead, A's son can sell the fee-simple under the resettlement, but subject to the jointure of A's widow and the portions of A's younger children, unless they are *sui juris* and concur in the conveyance; or he can sell under the compound settlement, free from the jointure and the portions, but in this case it would be necessary to apply to the Court to appoint trustees of the compound settlement unless such trustees were appointed by the first settlement (*g*). A's son cannot sell the fee-simple under the original settlement, as he never had the estate or the powers of a tenant for life under that settlement, and trustees of the compound settlement cannot be appointed by the resettlement unless all persons beneficially interested in the settled estates were at that time *sui juris* and concurred in making the appointment (*h*). This could not

(*e*) *Re Constable* [1919] 1 Ch. 178. (*f*) Wms. V. & P. 315-7.
(*g*) *Re Marquis of Ailesbury and Lord Iveagh* [1893] 2 Ch. 345; *Re Mundy and Roper* [1899] 1 Ch. 275; *Re Trafford* [1915] 1 Ch. 9; *Re Monckton* [1917] 1 Ch. 224.
(*h*) *Re Spearman's Settled Estates* [1906] 2 Ch. 502; *Re Spencer's Settled Estates* [1903] 1 Ch. 75.

normally occur, for the jointure of A's wife is generally restrained from anticipation, and A's younger children, to whom portions have been given, would, in most cases, be under age when the resettlement was made, as such resettlement is generally made immediately on A's eldest son attaining the age of twenty-one.

Persons having the powers of a tenant for life.

By the Settled Land Act, 1882, s. 58, each of the following persons, while his estate is in possession, has, if beneficially entitled, the same powers as a tenant for life, viz., (i) a tenant in tail (with the exception of a tenant in tail who is by Act of Parliament restrained from barring his fee tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services), until execution by him of a disentailing deed (*hh*); (ii) a tenant in fee-simple subject to an executory gift over (*e.g.*, where land has been devised to A in fee-simple, but if he die without issue to B); (iii) a person entitled to a base fee of any kind; (iv) a tenant for years determinable on life, not holding merely under a lease at a rent; (v) a tenant for the life of another, not holding merely under a lease at a rent; (vi) a tenant for his own or any other life whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose; (vii) a tenant in tail after possibility of issue extinct; (viii) a tenant by the curtesy. Where a woman takes under a conveyance or will, or where she takes by descent, her husband's tenancy by the curtesy is to be considered as arising under a settlement made by his wife (*i*); (ix) a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other

(*hh*) *Re Trafford* [1915] 1 Ch. 9.
(*i*) Settled Land Act, 1884, s. 8.

event. Where there is such a trust for payment of surplus income to a man during his life, he has the powers of a tenant for life, even if in the event there is no surplus to be paid to him (*j*).

The Settled Land Act, 1882, s. 59 provides that where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of the Act the land is settled land, and the infant is to be deemed tenant for life thereof.

Persons together constituting tenant for life.

If there are two or more persons for the time being entitled, *i.e.*, beneficially entitled, under a settlement to the possession of settled land for their lives, as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act, and must therefore concur in the exercise of the powers (*k*). Neither of them can be compelled to concur. But if the owners of undivided shares of land make separate settlements of their shares, or if each share is separately settled by the instrument of gift, each share is settled land within the meaning of the Act. Hence if land is settled on A and B as tenants in common for life, A could not sell the fee-simple without the concurrence of B; but if A made a settlement of his share on X, X could sell the fee-simple of that share without the concurrence of B (*l*).

Where two or more persons constitute together the tenant for life, and the trustees of the settlement have an express power of sale, the consent of any one of such persons to the exercise of the power of sale is sufficient (*m*).

Infants.

If an infant is, or would if of full age be, tenant for life or have the powers of a tenant for life, the powers of the

(*j*) *Re Jones*, 24 Ch. D. 583; Elph. Conv. 522-4.
(*k*) Settled Land Act, 1882, s. 2 (6).
(*l*) *Ibid.* s. 2 (10) (i); *Cooper* v. *Belsey* [1899] 1 Ch. 639.
(*m*) Settled Land Act, 1884, s. 6.

Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian, or next friend of the infant, either generally or in a particular case, orders (*n*).

Married women.

A married woman entitled as tenant for life, or as a person having the powers of a tenant for life, can, if she is entitled for her separate use (either by express declaration or under the provisions of the Married Women's Property Act, 1882), exercise the powers of the Act without her husband. A restraint on anticipation in the settlement is not to prevent the exercise by her of any power under the Act. Where she is not entitled for her separate use, then she and her husband together shall have the powers of a tenant for life under the Act (*o*).

Lunatic.

Where a tenant for life, or a person having the powers of a tenant for life under the Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor or other person entrusted by virtue of the King's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under the Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate (*p*). By the Lunacy Act, 1908, in the case of any of the persons mentioned in sub-section (1) of section 116 of the Lunacy Act, 1890, not being a lunatic so found by inquisition, any powers which, if such person were a lunatic so found by inquisition, could be exercised by the committee of the estate, may be exercised by such person in such manner as the Judge in Lunacy, or, subject to the rules in lunacy, a Master may direct (*q*).

Discretionary trust.

Land is sometimes settled on trustees in trust for A for life or until he becomes bankrupt or attempts to charge his

(*n*) Settled Land Act, 1882, s. 60.
(*o*) *Ibid.* s. 61.
(*p*) *Ibid.* s. 62.
(*q*) 8 Edw. 7, c. 47, s. 1.

life interest with payment of his debts, and the trustees are authorised, after the determination of the husband's life interest, during the residue of his life to pay all or any part of the income to, or to apply it towards the maintenance and support of, A, his wife for the time being, his children, or any of them to the exclusion of the others. In such a case, A, until he becomes bankrupt or attempts to charge his life interest, has the powers of a tenant for life under the Settled Land Acts; but if the trustees have, after the determination of the estate of A, gone into possession and hold the rents on the discretionary trust for the benefit of a number of persons, there is no one "beneficially entitled in possession" within the meaning of the Settled Land Acts and the powers of the Acts cannot be exercised (*r*).

Fiduciary position of tenant for life.

A tenant for life must in the exercise of the powers conferred on him by the Settled Land Acts, have regard to the interests of all parties entitled under the settlement, and is in the position of a trustee towards them (*s*); but a purchaser, etc., dealing in good faith with the tenant for life is protected (*t*). Hence, although an improper sale or other transaction may be valid in favour of a purchaser, it may nevertheless, on the part of the tenant for life, be a breach of trust, for which he may be liable to the remainderman (*u*).

Settlements of land upon trust for sale.

The Settled Land Act, 1882, s. 63, extended the provisions of the Act to settlements made by way of trust or direction for sale of land, *i.e.*, where land is vested in trustees upon trust to sell and hold the proceeds in trust for A for life, etc., with a power for the trustees to postpone the sale. The person beneficially entitled to the income of the land until sale is to be deemed to be tenant for life thereof. This provision caused much inconvenience on sales by trustees of

(*r*) Elph. Conv. 527.
(*s*) Settled Land Act, 1882, s. 53.
(*t*) *Ibid.* s. 54.
(*u*) Elph. Conv. 531; *Sutherland* v. *Sutherland* [1893] 3 Ch. 169; *Re Hunt* [1906] 2 Ch. 11; *Re Gladwin* [1919] 1 Ch. 232.

trust property held by them upon trust for sale, especially where the sale moneys were to be divided and each share was settled, as it rendered the concurrence of the tenant for life of each share necessary. The Settled Land Act, 1884 (s. 6), therefore, provided that, in the case of such a settlement, the trustees can sell without the consent of the tenant for life. By the same Act (s. 7) the powers conferred on tenants for life by section 63 of the Act of 1882 (*i.e.*, when the settlement is by way of *trust* for sale) are not to be exercised without the leave of the Court; the order giving leave may be registered as a *lis pendens*, and persons dealing with the trustees will not be affected by it unless it is so registered; and while it is in force, no person other than the person having the leave can execute any trust or power created by the settlement for any purpose for which leave is given by the Court (*v*).

(The student must be careful to distinguish a *trust* for sale from a mere *power* to sell. Where land is settled upon trustees in trust for A for life, etc., and the trustees are given a *power* to sell, and A is *sui juris*, the trustees cannot sell without A's consent, and A can exercise the statutory power of sale under the Settled Land Act, 1882, without the consent of the trustees or of the Court.)

Another difficulty which formerly attended a sale by trustees under a trust for sale was that of satisfying the purchaser that the trust was still continuing. This has been removed by the Conveyancing Act, 1911, which provides (*w*) that a trust for sale of land, so far as regards the safety and protection of any purchaser thereunder, is to be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale.

In settlements within the meaning of section 63 of the Settled Land Act, 1882, or other settlements of property

(*v*) Elph. Conv. 171-2.

(*w*) 1 & 2 Geo. 5, c. 37, s. 10 (3).

as personalty, made after 1911, and containing power to invest money in the purchase of land, a trust for sale of land purchased under the power, with power to postpone the sale, is implied by virtue of the Conveyancing Act, 1911, s. 10, unless the settlement otherwise provides; and the net rents and profits until sale, after keeping down the costs of repairs and insurance and other outgoings, shall be paid or applied in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested in personal estate. This section dispenses with the necessity of inserting special clauses in such settlements providing for the sale of land so purchased and the application of the rents and profits until sale (*x*).

V. Settlements of Personalty (*y*).

It is not intended here to deal at any great length with settlements of personal property, but merely to set out shortly the usual clauses contained in a marriage settlement when personal property is brought in on the side of both husband and wife, and it is intended that, subject to the life interests of husband and wife, the property shall be divided among the children of the marriage. The husband, "as settlor," transfers the personal property he intends to settle to the trustees in trust for the said settlor until the solemnisation of the intended marriage and afterwards "upon the trusts and subject to the powers and provisions hereinafter declared and contained concerning the same." A similar assignment is made by the intended wife. If the wife's father or other relation is settling the property settled on the wife, he assigns it as settlor to the trustees in trust for himself until the marriage and afterwards upon the trusts hereinafter declared.

Then follows the declaration of the trusts after marriage, *i.e.*, (1) trust for the investment of the money "in or upon

(*x*) Elph. Conv. 429. (*y*) See Precedents XL., XLI., XLII.

any of the investments hereby authorised for investment of trust money " with power to vary investments; (2) trusts for payment of the income of the property settled by or on behalf of the intended husband (the " husband's fortune "), to the husband for life and then to his wife for life; (3) trusts for payment of the income of the property settled by or on behalf of the intended wife (the " wife's fortune "), to her for life and then to her husband for life; (4) trusts of capital and income of both fortunes for the children or remoter issue of the marriage at such age or time in such shares, and on such conditions, and in such manner as the husband and wife shall by deed appoint; and in default of joint appointment, or so far as such appointment does not extend, as survivor of them shall by deed or will appoint; and in default of appointment, in trust for all or any the children of the intended marriage who being sons attain the age of twenty-one years, or being daughters attain that age or marry, and if more that one in equal shares; (5) ultimate trust of capital and income of the two fortunes respectively, *i.e.*, if there should be no child of the marriage, to attain a vested interest, the husband's fortune is to be held in trust for him absolutely so that he can dispose of his interest in his lifetime or by his will, subject of course to his wife's life interest if she should survive him, and the wife's fortune is to be held in trust for her absolutely if she survive the husband, and if she die before him, then (subject to his life interest), it is to pass under her will and if she die intestate is to go to her next-of-kin under the statutes for the distribution of the effects of intestates as if she had never been married (*z*).

A covenant by the intended wife to settle her after-acquired property is usually inserted in the settlement. If the settlement contains such a covenant, the intended wife should be given a power to make some provision out of her fortune for any subsequent husband and her issue by him, as, if this is not done, she may have but one child by her

(*z*) Elph. Conv. 400.

first husband, who will take all her fortune, leaving her children by a future marriage unprovided for (*a*).

Let us now consider the various clauses set out above.

Covenants for title.

Formerly the settlor was sometimes made to enter into full covenants for title as in a conveyance on sale. This occasionally led to unfortunate consequences; for if a charge on the property, which had been overlooked, was afterwards enforced, the trustees of the settlement were under the duty to sue the settlor on his covenants—a course which might involve the settlor in serious loss and, where the settlor was the husband, was not for the benefit of the wife and children of the marriage. According to the present practice, the settlor is made to convey "as settlor." The Conveyancing Act, 1881 (s. 7), provides that in a conveyance by way of settlement every person who conveys and is expressed to convey as settlor shall be deemed to covenant for further assurance, *i.e.*, that the settlor will, on being required to do so by the trustees, do all further acts reasonably necessary for more perfectly assuring to the trustees the property transferred, and this covenant extends to the acts of every person claiming under the settlor, either by deed or act or operation of law in his lifetime subsequent to the settlement, or by testamentary disposition, or devolution in law on his death.

First life interest.

The usual practice is for husband and wife each to take the first life interest in the property settled on his or her behalf, except that sometimes, where the husband is engaged in trade, the wife takes the first life interest in both properties (*b*).

When the wife takes the first life interest in any part of the trust funds, the income is usually given to her subject to a restraint on anticipation.

(*a*) Elph. Conv. 415. (*b*) *Ibid.* 435.

Second life interest.

When the wife takes the second life interest (*i.e.*, a life interest after her husband's death) in personal property, it is usual expressly to restrain her from anticipating it, because this prevents her from alienating it during the present or any subsequent coverture unless the Court permits the alienation of it, as it may do under section 7 of the Conveyancing Act, 1911, when it appears to be for her benefit and she consents.

When the husband takes the second life interest in the property settled on behalf of his wife, it is sometimes made determinable on his bankruptcy or on his attempting to alienate or charge it, and if the husband's life interest should so determine, the income is to be held on the same trusts as if he were dead.

Trusts for the issue.

The trusts for the issue comprise: (1) a power of appointment among the issue of the marriage, *i.e.*, all lineal descendants of the husband and wife; (2) trusts for the children in default of appointment; (3) a hotchpot clause; (4) an advancement clause.

Hotchpot clause.

When an appointment is made to a child, or the issue of a child, the mere fact of the appointment does not exclude the child from taking a share in such part of the fund as remains unappointed. This result would generally be contrary to the intention, as it would create inequality among the children (*c*). Suppose, for instance, a man has four children, that the settled fund is £10,000, and that on the marriage of a daughter he appoints £2,000 to her and dies without making any further appointment; then she might take one-fourth of the unappointed £8,000; *i.e.*, another £2,000, or £4,000 altogether. To prevent such inequality the "hotchpot clause" is usually inserted. This modifies the trust for equal division in default of appointment by declaring that no child to whom a share is appointed shall, in default of appointment to the contrary, take any share in

(*c*) Elph. Conv. 449.

the unappointed part without bringing the appointed share into hotchpot, *i.e.*, until each of the other children shall have received a share equal to his or hers. Thus, in the case suggested above, if the hotchpot clause is inserted in the settlement, the daughter must bring into account the £2,000 appointed to her and would therefore take £500 only of the unappointed sum which, together with the £2,000, would amount to £2,500. This would leave £7,500 to be divided between the other three children, *i.e.*, £2,500 each. But supposing the father to have appointed to his daughter on her marriage £4,000, then it is clearly to her interest not to bring this into hotchpot. She will make no claim on the unappointed part, and the other three children will take £2,000 each.

Advancement clause.

An immediate provision for any child during the lifetime of the parents can be made if the settlement contains "a power of advancement." This is a power given to the trustees, with the consent in writing of the parents during their joint lives, and of the survivor during his or her life, and after the death of the survivor at the discretion of the trustees, to apply for the benefit or advancement in the world of any child of the intended marriage part (usually not exceeding one half) of the share of capital to which, if it attained twenty-one, it would become entitled on the death of its surviving parent.

Maintenance and accumulation clause.

A maintenance clause providing for the maintenance of minors out of income and for the accumulation of surplus income was usually inserted in settlements made before 1882. The object of the clause was to enable the trustees, after the death of the husband and wife, to apply the income of the share to which each minor became presumptively entitled for its maintenance and to accumulate the surplus. The sections of Lord Cranworth's Act (*d*), which were intended to supply the place of the maintenance and accumulation clauses, were repealed by the Conveyancing

(*d*) 23 & 24 Vict. c. 145.

Act, 1881, s. 71, and re-enacted in an amended form by section 43, which enacts that "where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not." The trustees must accumulate the surplus of the income at compound interest for the benefit of the person who ultimately becomes entitled to the property, but the trustees have power to apply the accumulations, or any part thereof, as if they were income arising during the current year. By sub-section 3, the section is not to apply where a contrary intention is expressed in the instrument creating the trust, but it applies whether the instrument comes into operation after 1881 or before 1882 (*e*).

If the infant is contingently entitled only, then if, on attaining twenty-one, he does not become entitled, either absolutely or for life (*f*), to the past income as well as the corpus of the property, section 43 does not apply, and the income cannot be used for maintenance unless there is an express maintenance clause. If there is a gift to a class of children to vest in such as attain twenty-one, and the settlement is of personalty, section 43 applies even though one of the children has attained twenty-one, so that the income of the shares that have not yet vested can be applied for the maintenance of those children who are still minors (*g*).

(*e*) Elph. Conv. 451-2.
(*f*) *Re Boulter* [1918] 2 Ch. 40.
(*g*) *Holford* v. *Holford* [1894] 3 Ch. 30. But if realty is devised to such of the children of A as attain twenty-one, the whole interest vests

Ultimate trusts clauses.

The general rule is that, subject to the life interests of the husband and wife and to the trusts for the issue of the marriage, property brought into settlement on the part of the husband is made to revert to him, so that he can dispose of his interest in his lifetime or by his will. But the wife's property is dealt with differently, for if it were given to her absolutely (subject to the prior interests of her husband and issue of the marriage), and she died before the husband, the husband, on taking out administration, would be entitled to the whole of the property. In order to avoid this, the practice is to declare an ultimate trust for such persons as the wife shall during coverture by will, or when not under coverture by deed or will, appoint; and, in default of appointment, for the wife absolutely if she should survive the husband, but if she should die in his lifetime, for the persons who would have been entitled thereto according to the statutes for the distribution of the effects of intestates, if she had died possessed thereof intestate and *without ever having been married* (*h*). Thus if the wife die before the husband, and there are no issue of the marriage, or the issue die before attaining a vested interest, the wife's share passes under her will, and she may, of course, leave it to her husband; but if she die intestate, her property would go to her next-of-kin according to the statutes of distribution excluding the husband. It is important to insert the words in italics rather than the words "died unmarried," for the words "die unmarried" are considered to mean in a marriage settlement "die a widow," so that, while they exclude the husband, they do not exclude infant children surviving the wife. If any such child died under age without issue, its share would pass to the husband as its next-of-kin, if he should survive it; so that if the words "died unmarried" be used, he might under the ultimate trust take the whole of the wife's property, to the exclusion of her relations (*i*). If the wife survive the husband, the deed

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in the first child who attains that age and he is entitled to the whole of the income until another share becomes vested, *Re Averill* [1898] 1 Ch. 523.

(*h*) Elph. Conv. 455.

(*i*) *Ibid.* 457-8.

gives her power to dispose of her interest by deed or by will. In declaring the class who are to take under the ultimate trust in default of appointment by the wife, the phrase "next-of-kin" should not be used in substitution for "the persons entitled under the Statutes of Distribution," for "next-of-kin," without reference to the Statutes of Distribution, means the nearest blood relations of the same degree (*e.g.*, if there were brothers and a nephew, the child of a deceased brother, the brothers would take all, excluding the nephew).

Covenant to settle wife; after-acquired property.

It is the practice to insert a covenant to settle any property which may be acquired by the wife during the coverture with specified exceptions. This is usually framed as an agreement and declaration that the wife's after-acquired property shall be settled, in which case it operates as a covenant by both husband and wife. But owing to the provisions of the Married Women's Property Act, 1882, and of the Married Women's Property Act, 1907, the husband's covenant is ineffectual unless the wife, being of full age, executes the settlement. Except, therefore, where the intended wife is an infant, the covenant on the part of the intended husband can be of no real value (*j*).

The property settled is generally stated to be—(1) any property to which the intended wife shall at the time of the intended marriage be entitled (in order to include reversionary interests falling into possession after the marriage); (2) any property which during the coverture she or (if the husband covenants) the husband in her right becomes entitled to, at the same time and from the same source, except (a) furniture, jewels, plate, etc.; (b) sums not exceeding a minimum value (often £200); (c) property as to which in the instrument under which it is acquired there is any condition or expression of intention on the part of the donor that it shall be exempt from the covenant; (d), property settled on her for life without power of anticipation.

(*j*) Elph. Conv. 411.

As usually framed, the clause does not include property over which the wife may acquire a general power of appointment, unless she exercises the power in her own favour. It would not include savings of income nor an estate tail. But, unless the covenant is worded as suggested above, it would include property given to the wife subject to a condition that it shall not be bound by her covenant to settle her after-acquired property (*k*).

Effect of bankruptcy on covenant to settle after-acquired property.

In connection with covenants by an intended wife or husband to settle after-acquired property, the student may be reminded of the provisions of the Bankruptcy Act, 1914 (*l*), that any covenant or contract made in consideration of marriage for the future payment of money for the benefit of the settlor's wife or husband or children, or for the future settlement on or for the settlor's wife or husband or children, of property wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of the bankruptcy, be void against the trustee in bankruptcy, except so far as it enables the persons entitled under the covenant or contract to prove in the bankruptcy as deferred creditors, *i.e.*, they are postponed until all other creditors for valuable consideration in money or money's worth are satisfied. Even if the money has been paid or the property has been transferred in pursuance of the covenant or contract before the commencement of the settlor's bankruptcy, the payment or transfer will be void against the trustee in bankruptcy unless the persons to whom payment or transfer was made can prove (1) that it was made more than two years before the commencement of the bankruptcy, or (2) that at the date of the payment or transfer the settlor could pay all his debts without the aid

(*k*) Elph. Conv. 413-4; *Re Wharton*, 102 L. T. 531; *Re Thorne* [1917] 1 Ch. 360.
(*l*) 4 & 5 Geo. 5, c. 59, s. 42 (2).

of the money so paid or property so transferred, or (3) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract, and was made within three months after the money or payment came into the possession or under the control of the settlor. If the payment or transfer is declared void, the persons to whom payment or transfer was made can prove as deferred creditors.

Trader's settlement.

The term "trader's settlement" is applied to a form of settlement where the owner of real property conveys it to trustees to sell and directs the trustees to hold the purchase money upon trusts similar to those of an ordinary settlement of personal property. The origin of the term appears to have been that a man who had made money in trade and had purchased land, and then desired to make a settlement of his property on his marriage or by his will, would not desire to tie up his land in strict settlement by virtue of which his eldest son, as first tenant in tail, would ultimately succeed to the bulk of the property, but would prefer that it should ultimately be divided among all his children.

If such a settlement is made by a man on his marriage, the proper scheme is not to settle the land itself but to vest it in trustees in trust for sale and to settle the proceeds of sale. The ordinary clauses and provisions of a settlement of personalty can then be made use of (*m*).

The land is conveyed by a separate deed to the trustees upon trust for the settlor until the marriage and afterwards upon trust that they the trustees shall, at the request in writing of the husband and wife or survivor of them, and after the death of such survivor at the discretion of the trustees, sell the land. The trusts of the purchase money are then set out in a separate deed.

(*m*) Elph. Conv. 406.

Keeping the the trusts off the title.

The object of drawing up two deeds, one conveying the land to the trustees and the other setting out the trusts of the purchase money, is "to keep the trusts off the title," *i.e.*, to avoid the inconvenience that would arise if the settlement was to become one of the title deeds of the property. The purchaser would then have the right to claim that such settlement, on the completion of the sale, should be handed over to him. But if two deeds, as explained above, are drawn up, then, after all the property is sold, the deed containing the trust for sale, being no longer of any use to the trustees, can be handed over to the purchaser, who is not concerned to see the deed containing the trusts of the purchase money, which is retained by the trustees (*n*).

The deed setting out the trusts of the purchase money contains the ordinary clauses and provisions of a settlement of personalty.

We have already (*o*) referred to the fact that, if land is conveyed to trustees upon trust for sale, section 63 of the Settled Land Act, 1882, as read with section 7 of the Settled Land Act, 1884, applies, and the trustees can sell without the consent of the tenant for life and the tenant for life cannot sell without an order of the Court. We have also mentioned above the provisions of the Conveyancing Act, 1911, as to such trusts.

(*n*) Elph. Conv. 407.

(*o*) Above, p. 216.

CHAPTER VII.

OF WILLS (*a*).

THE subject for our consideration in this chapter is a Will of Land. In the previous chapters of our work we have gone through the clauses of a simple form of the particular instrument under discussion, in order to show how the practical work of conveyancing is made to comply with the rules of law. But when we come to the subject of wills it is not possible for us to adopt our usual plan. All the other instruments to which our attention has hitherto been directed, however much they may vary in detail, have some parts common to the class to which they belong. The covenants in a mortgage deed, the lessee's covenants in a lease, the limitations in a strict settlement, vary only within moderate limits; and the observation, therefore, of any one set of them serves as a guide in framing all other assurances of a like nature. But with wills the case is different. There may be, and often is, a similarity between one will and another. The conveyancer may be able to lay his finger upon this and that form, and say that they ought, respectively, to be made use of in certain cases, but he cannot say of any of the important parts of any one will that they are matters of common form.

The general arrangement of a will is as follows: 1. Commencement ("I, J. S. of ——, hereby revoke all former wills and codicils made by me, and declare this to be my last will.") 2. Appointment of executors. 3. Specific legacies. 4. General legacies and annuities. 5. Specific devises. 6. Residuary gift. 7. Testimonium. The word "devise"

(*a*) See Precedent XLIII.

is generally taken to refer to real estate, "bequeath" to personalty; a legacy is a gift of personal property, a devise is a gift of real property. A specific legacy is a gift of a definite thing or part of the testator's personal estate, *e.g.*, "my gold watch," "the sum of £10,000 Consols standing in my name on the day of the date of my will." A general legacy may or may not be a part of the testator's property; thus, a legacy of £1,000, a diamond ring worth £500, are general legacies. A specific legacy fails if the subject of it does not belong to the testator at the time of his death. A demonstrative legacy is a general legacy charged on a particular fund; as a gift of so much money "to be raised by the sale of my Government stock." It is a general legacy, inasmuch as the legatee is entitled to have it raised even if the fund out of which it is to be raised should fail; on the other hand, it is so far specific that it is not liable to abate with general legacies on a deficiency of assets, if the particular fund exists out of which it is directed to be paid (*b*). A devise of land is specific even if given by way of residue.

We will, after a few words on the qualifications necessary to enable a person to make a will, arrange our subject under three headings, namely:—1st, the execution and attestation of wills; 2nd, the estates and interests in land which can be disposed of by will, including certain rules of construction; and 3rd, the revocation of wills.

Proposed division of the subject.

The principal rules which govern the making of wills at the present day are to be found in the 7 Wm. IV. & 1 Vict. c. 26 (generally known as the Wills Act), which applies to all wills made in England and Wales, or Ireland, since the 31st of December, 1837. The Act first says that it shall be lawful for every person (*c*) to make a will, and subsequently excepts two classes from this general rule. These are: persons under the age of twenty-one years (*d*) and married women, except in so far as they might have made a will before the passing of the Act (*e*). To the

The Wills Act.

Who may make a will.

(*b*) Elph. Conv. 566. (*c*) S. 3. (*d*) S. 7. (*e*) S. 8.

incapacity of an infant to make a will, an exception was made, by another section (*f*) of the Act, with regard to a will of personalty by a soldier or sailor who is an infant. We may add the incapacity of persons who cannot make a will on account of natural or temporal incapacity, such as idiots, lunatics, and those who from old age or other causes have outlived their understanding, or who are subject to undue influence.

Wills of infants.

Formerly a will of personalty could be made by a male after fourteen or female after twelve years of age. By the Wills Act, 1837, every will of an infant was declared to be void except a will disposing of personalty made by any soldier being in actual military service, or any mariner or seaman being at sea. Such will may be written and unattested or verbal before witnesses (*f*). By the Wills (Soldiers and Sailors) Act, 1918, section 11 of the Wills Act, 1837, is extended to any member of His Majesty's naval or marine forces, not only when he is at sea, but also when he is so circumstanced that if he were a soldier he would be in actual military service; and the power of testamentary disposition given by section 11 of the Wills Act, 1837, is extended to real estate. "Soldier" includes a member of the Air Force.

Wills of married women.

The Wills Act, 1837, left married women under the same disability as before the Act (*g*). A married woman was, therefore, unable to make a will except (1) of her separate estate in equity; (2) as executrix, *i.e.*, if appointed executrix under the will of A she could make a will for the purpose of appointing an executor to continue the representation; (3) as donee of a power of appointment giving her power to appoint property by her will; (4) of her personal property, including leaseholds, with the concurrence of her husband. By the Married Women's Property Act, 1882 (*h*), it is, however, provided that "a married woman shall, in accordance

(*f*) S. 11, as interpreted by Wills (Soldiers and Sailors) Act, 1918.
(*g*) See *Thomas* v. *Jones*, 2 J. & H. 475, 483.
(*h*) 45 & 46 Vict. c. 75, s. 1.

with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee." It was held that this enactment gave her power to dispose only of property of which she was possessed during coverture (*i*); and, therefore, if she survived her husband and acquired property after his death, her will made during coverture was not effective to dispose of such property unless she republished it. But the Married Women's Property Act, 1893 (*j*), which applies to the will of every married woman who dies after the Act came into operation, whether the will was executed before the Act or not, provided that the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making the will, shall apply to all the property she owns for her separate use at the time of her death unless a contrary intention shall appear by the will.

Execution and attestation of wills.

We next come to the execution and attestation of wills. Before the passing of the Wills Act, a will of personal estate might, under certain circumstances, be made by parol, and if in writing did not require any attestation. A will of real estate, on the other hand, was invalid unless attested by three witnesses. The Wills Act established a uniform rule for the execution of every kind of will. It enacts (*k*) that no will (a term which includes a codicil to a will) shall be valid unless it shall be in writing and executed in the manner thereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two, or more, witnesses, present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. It further enacted (*l*) that no

(*i*) *Re Price*, 28 Ch. D. 709.
(*j*) 56 & 57 Vict. c. 63, s. 3.
(*k*) S. 9.
(*l*) S. 10.

appointment made by will in exercise of any power shall be valid, unless the same be executed in the manner required by the Act for the execution of wills: and that every will so executed shall so far as regards the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

An exception was made as regards wills of personalty of soldiers being in actual military service and marines and seamen being at sea (*m*), and this is now extended to wills of realty by the Wills (Soldiers and Sailors) Act, 1918. Such wills may be written and unattested or made verbally before witnesses.

A will may incorporate other documents provided it can be proved that such documents were in existence at the time the will was made and are sufficiently identified as so existing in the will (*n*).

With respect to changes made in a will after its execution, the Act says (*o*) that no obliteration, interlineation, or other alteration, made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed and attested in the same manner as a will. But it is provided that such alteration shall be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin of the will near such alteration, or near a memorandum referring to such alteration, and written in some part of the will. If therefore, there is an unattested alteration in a will, and the will

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(*m*) Sect. 11; *Re Wernher* [1918] 2 Ch. 82.
(*n*) *University College of North Wales and University of Wales* v. *Taylor* (1908) 77 L. J. p. 20.
(*o*) S. 21.

is intelligible without such alteration, the latter will be struck out of the will unless it can be proved to have been made before the will was executed. However, it is always better to attest every alteration in a will, although it may have been made before the will was executed; since, unless the signature, or the initials (*p*), of the testator, and of the witnesses, are placed in the margin near the alteration, or unless there is some attested memorandum referring to the alteration, the Court will require evidence that it was made before the execution of the will.

Signature.

Position of the signatures.

Wills Act Amendment Act.

The next point to be noticed is that the will must be signed at the foot or end thereof. Non-compliance with this apparently simple direction formerly made many wills invalid, and consequently there was passed the Wills Act Amendment Act (*q*), which applies to every will which had not, prior to the 17th of June, 1852, been pronounced to be defectively executed. This Act provides (*r*) that a will shall be valid if the testator's signature shall be so placed at, or after, or following, or under, or beside, or opposite to, the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that a blank space shall intervene between the concluding word of the will and the signature; or by the circumstance that the signature shall be placed amongst the words of the testimonium clause, or of the clause of attestation; or shall follow, or be after, or under, or beside, the names, or one of the names, of the subscribing witnesses; or by the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will, whereon no clause, or paragraph, or disposing part, of the will shall be written above the signature; or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper

(*p*) *In the Goods of Blewitt*, 5 P. Div. 116.
(*q*) 15 & 16 Vict. c. 24.
(*r*) S. 1.

on which the will is written, to contain the signature. Under this Act, a will has been held to be well executed where the testator's signature and the attestation of the witnesses were alone written on top of the fourth page of a sheet of notepaper, the will being written on the first three pages (*s*). But nothing following the signature is valid. Thus where the writing was on three pages and the signature at foot of the first page, it was held that the signature was at the foot or end of the writing on the first page only and that that page was properly executed, but that the two following pages were not (*t*).

Signature by the testator.

The will may be signed either by the testator or by some other person in his presence and by his direction; but such signature must be made or acknowledged by him in the presence of two or more witnesses, present at the same time. If the testator cannot write, or is too ill to write, he may either make his mark (*u*), or direct his signature to be made for him. This may be done by one of the attesting witnesses (*v*): and it will be a good execution if the witness signs his own name, stating in the will that he does so on behalf of the testator, in his presence, and by his direction (*w*). But it is essential that the testator should know, and approve of, the contents of the will at the time of its execution (*x*).

Signature on behalf of the testator.

Signature or acknowledgment by the testator.

Presence of the witnesses.

Both the witnesses must be present when the will is signed or when it is acknowledged (*y*), but although the Act requires the signature to be made in the presence of two witnesses, it does not make it requisite that they should actually see the testator write. It is sufficient if they see him in the act of writing what is presumably his

(*s*) *Re Archer*, L. R. 2 P. & M. 252.
(*t*) *In the Goods of Anstie* [1893] P 283.
(*u*) *In the Goods of Clarke*, 1 Sw. & Tr. 22.
(*v*) *Re Bailey*, 1 Curt. 914; *Smith* v. *Harris*, 1 Rob. 262.
(*w*) *Re Clark*, 2 Curt. 329.
(*x*) *Hastilow* v. *Stobie*, L. R. 1 P. & M. 64; see *Cleare* v. *Cleare*, L. R. 1 P. & M. 655; *Atter* v. *Atkinson*, L. R. 1 P. & M. 665.
(*y*) *Re Ayling*, 1 Curt. 913; *Re Mansfield*, 1 No. Cas. 362; *Wyatt* v. *Berry* [1893] P. 5.

signature (*z*); or even if they are in such a position that they may, if they please, see him in the act of writing (*a*). It is, however, essential that there should be a possibility of the witnesses seeing the testator write, and that his signature should be made before those of the witnesses are affixed to the will (*b*). If he has already affixed his signature to the will, he can acknowledge it in the presence of the witnesses. No particular form of acknowledgment is necessary, nor need the testator say in so many words that the signature is his (*c*); and very slight acts on his part will be held to amount to an acknowledgment (*d*). The witnesses must, at the time of the acknowledgment, see, or have the opportunity of seeing, the signature of the testator, and if such be not the case, the will will not be properly acknowledged, even though the signature is in fact affixed to it, and the testator states to the witnesses that the document before them is his will (*e*). A witness may sign by means of a mark, which will be a good signature although a wrong surname is written opposite to it, if it is clear that the will was otherwise properly attested (*f*); and a witness may make a mark even though he can write (*g*). The testator must be in such a position that he can see the witnesses sign if he wishes to do so (*h*), and must also be aware that they are signing (*i*); but it is not necessary that one witness should sign in the presence of the other.

Signature by witnesses.

The witnesses must not only subscribe the will: they must also attest it. Now to "attest" a will means to put one's name to it as bearing witness to the fact of its having been signed by the testator. A signature, therefore,

Attestation of the will.

(*z*) *Smith* v. *Smith*, L. R. 1 P. & M. 143.
(*a*) *Newton* v. *Clarke*, 2 Curt. 320; and see *Casson* v. *Dade*, 1 Bro. C. C. 98.
(*b*) *Re Olding*, 2 Curt. 865; *Re Byrd*, 3 Curt. 117.
(*c*) *Keigwin* v. *Keigwin*, 3 Curt. 607, 611.
(*d*) See *Re Warden*, 2 Curt. 334; *Gaze* v. *Gaze*, 3 Curt. 451.
(*e*) *Re Gunstan*, 7 P. D. 102.
(*f*) *Re Ashmore*, 3 Curt. 756.
(*g*) *Re Amiss*, 2 Rob. 116.
(*h*) *Newton* v. *Clarke*, 2 Curt. 320; *Norton* v. *Bazett*, 3 Jur. (N.S.) 1084.
(*i*) *Jenner* v. *Finch*, 5 P. D. 106.

appended without the intention of attesting the will does not constitute the person signing a witness. Where, for instance (*j*), a will was signed at the end of the first page by the testator and by one other person as a witness, and at the top of the next page there was a memorandum referring to the testator's property, followed by the signatures of three other persons, it was held that these last had not signed as witnesses, and that the will was, therefore, invalid.

Form of attestation.

The Act says that no form of attestation shall be necessary; and it has been decided that this obviates the necessity of any form at all, not merely of any particular form (*k*). But it is always desirable to add an attestation clause to a will, since, without it, probate will not be granted unless evidence is given, if obtainable, that all the formalities required by the Act have been complied with. If the attestation clause is present, probate of the will can be obtained on the affidavit of the executors that they believe the will to be the true and last will of the deceased.

Selection of witnesses.

In selecting witnesses for a will, care should be taken not to include any persons on whom any benefit is conferred by the will. For the Wills Act enacts (*l*) that if any person shall attest the execution of any will to whom, or to whose wife or husband, any beneficial devise, estate, interest, or appointment, of, or affecting, any real or personal estate (other than charges and directions for the payment of debts), shall be thereby given, such devise, estate, interest, or appointment shall, so far as regards such person, or the wife or husband of such person, be utterly null and void; but such person may still be admitted as a witness to prove the execution of the will. It is also provided that a creditor who attests a will providing for payment of debts (*m*), or a person attesting a will of which he is appointed executor (*n*), shall be competent to prove its due execution. The fact of a person to whom a gift is made

(*j*) *Re Wilson*, L. R. 1 P. & M. 269.
(*k*) *Re Thomas*, 7 W. R. 270; *Bryan* v. *White*, 2 Rob. 315.
(*l*) S. 15. (*m*) S. 16. (*n*) S. 17.

upon trust being a witness does not invalidate the gift, even when the particular way in which it is to be applied for the benefit of the object designated is left to his discretion (*o*). If a will has been inadvertently attested by two persons, one of whom takes some benefit under it, it is not necessary to make a new will; for a codicil witnessed by two indifferent persons, and confirming the will, makes the gift valid (*p*). The subsequent marriage of a witness to a person entitled to the benefit of a devise or bequest does not invalidate that devise or bequest (*q*).

By what law a will is governed.

It may be mentioned here that a will of land is governed by the law of the country in which the land is, not by that of the country where the testator is domiciled. Hence, a will devising real estate situate in England must, in order to be effectual, be made in compliance with the law of this country; if written in a foreign language it must contain expressions which would, if translated into English, comprise and destine the land is question, and it must be executed and attested in precisely the same manner as if it were made in England. A will of leaseholds situate in England must (with the exceptions mentioned below) be made in accordance with English law. A will of moveables must (with the exceptions mentioned below) be made in accordance with the law of the testator's domicile. The exceptions are as follows: (1) a will exercising a power of appointment over personalty included in an English settlement may be made according to English law, or according to the testator's domicile (*r*); (2) by the Wills Act, 1861 (commonly known as Lord Kingsdown's Act), s. 1, it is provided (*s*) that every will made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death)

(*o*) *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69.
(*p*) *Anderson* v. *Anderson*, L. R. 13 Eq. 381.
(*q*) *Thorpe* v. *Bestwick*, 6 Q. B. D. p. 311.
(*r*) *Murphy* v. *Deichler* [1909] A. C. 446; *Re Wilkinson* [1917] 1 Ch. 620.
(*s*) 24 & 25 Vict. c. 114, s. 1.

shall, as regards personal estate (and this has been held to include leaseholds (*t*) and realty settled on trust for sale (*u*)) be held to be well executed for the purpose of being admitted to probate, if the same be made according to the forms required by the law of the place where the will was made, or by the law of the place when such person was domiciled when the will was made, or by the laws then in force in that part of His Majesty's dominions where he had his domicile of origin; (3) by the Wills Act, 1861, s. 2, wills of personalty made by British subjects within the United Kingdom shall be well executed, whatever the domicile of the testator was at the time he made the will or at his death, if it was made according to the law of that part of the United Kingdom in which it was made.

The Wills Act, 1861, s. 3, provides that no will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same. This section applies to foreigners as well as to British subjects (*v*).

What property may be disposed of by will.

The Wills Act also defines the estates and interests in land which may be disposed of by will. These include (*w*) all real and all personal estate to which a testator is entitled, either at law or in equity, at the time of his death; and which, if not so devised, bequeathed, or disposed of, would descend upon the heir at law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator. It is also provided that the power of disposition by will shall extend to copyholds, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or that the

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(*t*) *Pepin* v. *Bruyère* [1902] 1 Ch. 24; *Re Grassi* [1905] 1 Ch. 584.
(*u*) *Re Lyne* [1919] 1 Ch. 80.
(*v*) *Re Groos* [1904] P. 269.
(*w*) S. 3.

same, but for the Act, could not have been disposed of by will. The power of disposition extends, moreover, to estates *pur autre vie;* to all contingent and future interests in real or personal estate; and to rights of entry, including also such of the above-mentioned estates and interests as the testator may be entitled to at the time of his death, notwithstanding that he may have become entitled to the same subsequently to the execution of his will.

The Act, therefore, enables a testator to devise and bequeath all estates in land except those held in joint-tenancy, or for an estate tail, or an estate in *quasi* tail, that is, an estate *pur autre vie* given to a man and the heirs of his body; for since none of these estates descend to a man's heir, executor, or administrator, they do not come within the Act. The statute enlarges the former rule of law, by enabling a man to devise all freeholds to which he is entitled at the time of his death, although he may have acquired them subsequently to the date of his will; whereas, previously to the Act, a devise of freeholds could only include those belonging to the testator at the time when he made his will; even though the will purported to devise all lands which he should have at the time of his decease (*x*). The Act also increases the power of devising copyholds, for a former Act (*y*), which partially did away with the necessity of a surrender of such estates before they could be disposed of by will, did not extend to the case of a devise by a devisee (*z*), or by a purchaser (*a*), who had not himself been admitted. But, notwithstanding the expression "which if not so devised would devolve upon his customary heir," the Act has not done away with the old rule that a devise of copyholds conveys no title to the property until the devisee has been admitted; and the legal estate therefore, in such a case, still remains in the heir of the copyholder until the admittance of the devisee (*b*).

Changes made by the Act. Freeholds.

Copyholds.

(*x*) *Bunter* v. *Coke*, Salk. 237.
(*y*) 55 Geo. III. c. 192.
(*z*) *Doe* v. *Laws*, 7 A. & E. 195.
(*a*) *Matthew* v. *Osborne*, 13 C. B. 919.
(*b*) *Glass* v. *Richardson*, 2 De G. M. & G. 658; *Garland* v. *Mead*, L. R. 6 Q. B. 441, 449.

Wills to be construed as speaking immediately before the death of the testator.

Residuary devise to include lapsed and void devises.

General devise to include copyholds and leaseholds.

General power of appointment executed by general devise.

Devise without words of limitation to pass fee-simple.

How contrary intention is shown.

In order still more effectually to guard against a testator's dying intestate as to any part of his property, the Act provides that, unless a contrary intention shall appear by the will, every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator (*c*); that a residuary devise shall include estates comprised in lapsed and void devises (*d*); that a general devise of the land of the testator, or of his land in any place, or in the occupation of any person, or otherwise described in a general manner, shall include copyhold and leasehold as well as freehold land (*e*); that a general devise or bequest of the real or personal estate of a testator shall include any real or personal estate which he may have power to appoint in any manner he may think proper (*f*); and that a devise of real estate without any words of limitation shall pass the whole of the estate or interest therein which the testator had power to dispose of by will (*g*).

In considering whether property passes by virtue of any of these sections, the test is whether the language of the will necessarily prevents it from so doing. If it does, of course, the sections do not apply. Thus where (*h*) a testator devised "all my freehold estate which I purchased from B," it was held that this particular description of the property as "freehold" prevented the will from passing a piece of leasehold land, mixed up with the freehold, which the testator had purchased from B, and the freehold reversion in which he had acquired after the date of his will. But the mere use of words which might refer to the date of the will does not prevent after-acquired property from passing, when such words are only used as part of a general description of property included in the will. Hence, a devise of "the house in which A now resides" has been held to pass a garden purchased by the testator after the date of his will,

(*c*) S. 24. (*d*) S. 25. (*e*) S. 26. (*f*) S. 27.
(*g*) S. 28.
(*h*) *Emuss* v. *Smith*, 2 De G. & Sm. 722.

and attached to the house (*i*). As regards a contrary intention appearing in the will by a reference to the tenure of property, it was decided, in one case, that the mere description of land as "leasehold" did not prevent the whole of the testator's estate in it from passing by the will, although he had, after the date of his will, purchased the fee-simple reversion in the land, and thus put an end to its character of leasehold (*j*). And in another case, where a testator had bequeathed to his wife "all my term and interest in the leasehold dwelling-house in which I now reside," and afterwards purchased the fee-simple reversion of the property, it was held that the will passed the whole fee-simple to the wife (*k*). But where a testator devised land, and after the date of his will sold the land and took a mortgage on the land to secure part of the purchase money, it was held that the devisee was not entitled to the mortgage (*l*).

Change made by the Act in case of leaseholds.

In enacting that a general devise of the testator's land shall include leaseholds, unless the will shows a contrary intention, the Act made another change in the law of wills. Formerly a devise of "lands," or of "lands and tenements," did not include leaseholds, unless, at the time of the devise, the testator had no freehold lands which could pass by his will (*m*). Since the passing of the Act, the presumption is that such words do include leaseholds (*n*). And not only the word "lands," standing alone, but even additional expressions, which would seem to apply particularly to freeholds, may now, when used in a general devise, pass the testator's leaseholds. Thus, in one case (*o*), leaseholds were held to be included in a devise of "all my lands and all other my real estate."

(*i*) *Re Midland Ry. Co.*, 34 Beav. 525; *Re Champion* [1893] 1 Ch. 101.

(*j*) *Cox* v. *Bennett*, L. R. 6 Eq. 422; and see *Miles* v. *Miles*, L. R. 1 Eq. 462.

(*k*) *Saxton* v. *Saxton*, 13 Ch. D. 359.

(*l*) *Re Clowes* [1893] 1 Ch. 214

(*m*) *Rose* v. *Bartlett*, Cro. Car. 292; *Thompson* v. *Lawley*, 2 Bos. & Pul. 303.

(*n*) See *Prescott* v. *Barker*, L. R. 9 Ch. 174, 186.

(*o*) *Wilson* v. *Eden*, 21 L. J. (Q. B.) 385.

As to land of which testator is trustee or mortgagee.

A general devise of real and leasehold estate would, before the Wills Act, have passed all land of which the testator was, at the time of making his will, seised or possessed as a trustee or as a mortgagee (*p*), unless there was something in the will inconsistent with such a construction (*q*). And the rule was extended by the operation of the statute to all estates or interests so vested in the testator at the time of his death. The question whether a general devise of land which the will also charged with payment of the testator's debts, or of legacies bequeathed by him, would pass land of which he was, when he died, sole trustee or mortgagee, gave rise to considerable difference of judicial opinion (*r*). But such questions cannot arise in regard to wills coming into operation after the 31st December, 1881, for, as to these, the Conveyancing Act, 1881, provides (*s*) that where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in him or them. And for the purposes of that section the personal representatives, for the time being, of the deceased are to be deemed in law his heirs and assigns within the meaning of all trusts and powers. This provision of the Act was held to apply to copyhold, but by the Copyhold Act, 1887, s. 45 (now Copyhold Act, 1894, s. 88), if a sole trustee or mortgagee who has been admitted as tenant on the Court rolls dies on or after September 16th, 1887, the legal estate devolves upon his devisee or customary heir.

As to powers of appointment.

The old rule as to the exercise of a power of appointment by will was that a general devise did not operate as an

(*p*) *Wall* v. *Bright*, 1 J. & W. 494; *Braybroke* v. *Inskip*, 8 Ves. 417.
(*q*) *Ex parte Marshall*, 9 Sim. 555; *Rackham* v. *Siddall*, 16 Sim. 297.
(*r*) See *Re Stevens*, L. R. 6 Eq. 597; *Re Brown and Sibly's Contract*, 3 Ch. D. 156; *Re Belliss' Trusts*, 5 Ch. D. 504.
(*s*) 44 & 45 Vict. c. 41, s. 30.

execution of a power, unless the testator showed by his will an intention that it should have that effect; the presumption, therefore, being against the power having been so exercised (*t*). Now, under the Act, the rule is the other way, and the presumption is that the testator did intend to exercise his power; and any one maintaining the negative must establish his case by showing that a contrary intention appears by the will. If a person makes his will and afterwards acquires a general power of appointment over property such property will pass under a general or residuary devise in the will (*u*). If a testator expressly exercises a general testamentary power of appointment in favour of A and leaves the residue of his property to B, and afterwards by a codicil revokes the appointment to A, this is not sufficient to show "a contrary intention" within section 27 of the Wills Act, 1837, and the property over which the testator had a general power will pass to B, under the residuary gift (*v*). But if the instrument giving the power of appointment requires the instrument executing the power to refer expressly to the power, and the testator in his will does not expressly refer to the power, section 27 of the Wills Act does not apply (*w*). It is to be noticed that the Act only speaks of a power to appoint in any manner the testator may think proper. A general devise cannot, therefore, operate under the Act as the execution of a special power, *i.e.*, a power to appoint in such manner as the testator may think fit, but amongst specified objects only (*x*). But if there is any indication in the will that the gift is made in pursuance of the power, *e.g.*, a reference to the power of appointment or a reference to the property subject to the power, the gift may take effect as an appointment under the power. Evidence of the fact that at the date of the will the testator had no real property of his own is not admitted to show an

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(*t*) *Clere's Case*, 6 Rep. 17b; *Andrews* v. *Emmott*, 2 Bro. C. C. 297, 300.
(*u*) *Airey* v. *Bower*, 12 App. Cas. 263.
(*v*) *Re Jarrett* [1919] 1 Ch. 366.
(*w*) *Phillips* v. *Cayley*, 43 Ch. D. 222.
(*x*) *Clove* v. *Awdry*, 12 Beav. 604.

intention to exercise a special power of appointment over realty by a general devise and bequest (*y*).

As to devise without words of limitation.

Before the passing of the Wills Act a devise by an owner in fee-simple of "lands," or even of "lands, tenements, and hereditaments" (*z*), conferred on the devisee an estate for life only, unless the devise contained words of limitation. Now such a devise will, in the absence of apparent intention to the contrary, give an estate in fee-simple, or other the whole estate or interest which the testator has power to dispose of by will in the land (*a*).

Devise to trustees.

The Wills Act, 1837, provides (*b*) that a devise of land to trustees shall vest in the trustees an estate *pur autre vie* if such estate is sufficient to enable them to discharge their active duties as trustees; if it is not they will take the fee-simple.

"Die without issue."

Before the Wills Act, 1837, if realty was devised "to A, and if he die without issue to B and his heirs," A took an estate tail; and if personalty was bequeathed "to A, and if he die without issue to B," A took an absolute interest and B got nothing. The Wills Act enacts (*c*) that if land is devised to A and his heirs, or to A and if he die without issue to B, A shall take a fee-simple with an executory devise over to B, if A dies without leaving issue him surviving, unless a contrary intention appear by the will. Thus the section in the Wills Act does not apply if land is devised "to A and the heirs of his body, and if he should die without issue to B." Here A takes a fee tail which he can bar and thereby defeat B's interest (*d*). Nor does the section apply if the land is left "to A, and if he should die without issue or under twenty-one then to B." Here A takes

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(*y*) *Re Acherley* [1913] 1 Ch. 516; *Re Williams*, 42 Ch. D. 93; *Re Huddleston* [1894] 3 Ch. 595.
(*z*) *Hopewell* v. *Ackland*, Salk. 238.
(*a*) Wills Act, 1837, s. 28.
(*b*) Ss. 30 and 31.
(*c*) S. 29.
(*d*) *Dawson* v. *Small*, L. R. 9 Ch. 651.

an absolute fee-simple on attaining twenty-one (*e*). But the section does apply if land is devised "to A, and if he die without issue male to B" (*f*), although in a will the words "issue male" are usually read as equivalent to "heirs male of body." If personalty is bequeathed to A "absolutely" or generally, with a gift over to B if A die without issue, the Wills Act enacts (*g*) that A shall take the absolute interest subject to an executory bequest over to B if A dies without leaving issue him surviving.

But in the case of a gift of *land* by will "to A, and if he die without issue to B," a further change was made by section 10 of the Conveyancing Act, 1882, under which the gift over to B becomes void directly any of A's issue attain the age of twenty-one.

Lapse.

The Wills Act, 1837, enacts (*h*) that if any devise of land shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, it shall be included in the residuary devise (if any) contained in such will, unless a contrary intention shall appear by the will. Before the Act lapsed legacies passed to the residuary legatee, but lapsed devises passed to the testator's heir at law. A lapsed share of residue, however, will not fall into residue, but will pass to the testator's heir at law or next-of-kin unless the testator has directed that it shall go back into the general residue (*i*).

Exception to law of lapse.

The Wills Act, 1837 (*j*), creates two exceptions to the general law of lapse: (1) where there is a devise in fee tail and the devisee dies in the lifetime of the testator, leaving issue capable of inheriting, and any such issue be living at the death of the testator; (2) where there is a devise or bequest of more than a life interest in property to a child or

(*e*) *Morris* v. *Morris*, 17 Beav. 198.
(*f*) *Re Edwards* [1894] 3 Ch. 644.
(*g*) S. 29. (*h*) S. 25. (*i*) *Re Palmer* [1893] 3 Ch. 369.
(*j*) Ss. 32 and 33.

other issue of the testator, and such child or other issue dies before, but leaves issue surviving, the testator. In both these cases the devise or bequest is to take effect as if the devisee or legatee had survived the testator and died immediately afterwards. In the case of the first exception this would mean that the issue of the devisee would inherit, but not necessarily so in the case of the second exception. Thus if A devises land to his daughter B, and B dies before A, leaving a child and a husband, the land devised to B, passes under her will, and if she had died intestate her husband takes a curtesy estate (*k*). If A leaves property (realty or personalty) to his son B, and B dies before A, leaving issue, and B at the time of his death is an undischarged bankrupt, B's trustee in bankruptcy takes the property left to B by A (*l*).

There is no lapse in the case of gifts to a class if any of the class survive the testator, and therefore section 33 of the Wills Act does not apply. Thus if A leaves property "to my children," only those children who survive A are entitled. Thus if A had three children, B, C, D, at the date of his will, and B predeceased A leaving issue, C and D take the whole property.

Revocation of a will.

By marriage.

The next branch of our subject is the Revocation of Wills. Before the passing of the Wills Act, a man's will was presumed to be revoked by the fact of his subsequently marrying and having a child born to him. But this presumption might be rebutted by the surrounding circumstances, as when the testator had, by such a will, provided for a future wife or for future children, or where the children of the marriage could obtain no benefit by the revocation of the will. A woman's will was absolutely revoked by her marriage alone, although she might happen to survive her husband. The law relating to the will of a woman remains almost unaltered, but a change is made by the present Act

(*k*) *Eager* v. *Furnival*, 17 Ch. D. 115
(*l*) *Re Pearson* (1920) 1 Ch. 247.

with regard to the will of a man. For it is enacted (*m*) that every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin under the Statute of Distributions. Nothing, therefore, can keep alive any will made before marriage, except the fact that its revocation cannot give the property in question to any of the persons mentioned in the Act. And the rule is not affected by the circumstance that the revocation of the will cannot possibly benefit any future husband, wife, or children. Thus (*n*), a woman who had a general power of appointment over freeholds, with remainder, in default of such appointment, to her heirs and assigns, exercised the power in favour of her two children by a first marriage, and then married again: it was held that her will was revoked, although the only result of this was to give the whole property to one of those two children, as her heir-at-law, without conferring any benefit on the children of the second marriage.

By presumption of intention.

The Act goes on to say that no will shall be revoked by any presumption of an intention to that effect, founded on an alteration in the circumstances of the testator (*o*); and that no conveyance, or other act, made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised (except any act declared by the statute to amount to a revocation), shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*p*). This enactment puts an end to the former unsatisfactory rule that a devise should not take effect unless the estate to which the testator was entitled when he made his will

(*m*) S. 18.
(*n*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 168.
(*o*) S. 19.
(*p*) S. 23.

remained unaltered until the time of his death. The result of this rule was that a devise of an estate was revoked if the testator mortgaged it after making his will, even though it was re-conveyed to him during his lifetime. The Act does not, however, apply to cases where the thing meant to be given is altogether gone. If, for instance, a man by his will gives an estate in land, and afterwards sells that estate, the devisee has no claim to the purchase-money, even though the purchase is not completed until after the testator's death (*q*). But if the contract is rescinded before the testator's death, the devisee is, of course, unaffected by it. If there is a specific devise of land, and after the death of the testator a person purchases that land in pursuance of an option given to him by the testator during his lifetime, the devisee will be entitled to the purchase-money if the will was made after the option to purchase had been given, but not otherwise (*r*).

Other modes of revocation.

With regard to revocation by other means, the Act provides (*s*) that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid; or by another will or codicil executed in the manner required by the Act; or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required by the Act to be executed; or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. It will be noticed that a subsequent will or codicil need not be expressly stated to be a revocation of a former will. If, therefore, there are two properly executed wills, making different dispositions of the same property, the former of them will be revoked, so far as concerns that property, by the mere making of the latter (*t*); but if the first of two such wills disposes of property which

By will or codicil.

(*q*) *Farrar* v. *Winterton*, 5 Beev. 1; and see *Moor* v. *Raisbeck*, 12 Sim. 123.

(*r*) *Weeding* v. *Weeding*, 1 J. & H. 424.

(*s*) S. 20.

(*t*) *Henfrey* v. *Henfrey*, 2 Curt. 468; *Thom* v. *Dickens* [1906] W. N. 54.

does not pass under the second, then the first is not revoked, so far as that disposition is concerned, by the fact that the second will begins with the words "this is my will" (*u*), or even with the words "this is my last will," if the Court on perusing the whole document comes to the conclusion that it was not the testator's intention to revoke the first will (*v*). If, however, the second will, or the codicil, expressly revokes all former wills, no previous will can, in general, be admitted to probate, even though it may be referred to by the subsequent revoking will (*w*), or though such revoking will cannot be found (*x*).

By writing executed like a will.

A will may also be revoked by a writing not in any way dealing with the testator's property, provided it be executed like a will and declare an intention to make a revocation. Consequently, in a case where a testator in a letter, signed by him in the presence of two witnesses, directed his brother to obtain his will from a third person and burn it without reading it; this was held to be a writing declaring an intention to revoke the will, which was consequently pronounced invalid (*y*).

By destruction of the will.

Cancellation not a revocation.

The other ways in which a will can be revoked are the burning, tearing, or otherwise destroying it, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. Before the Wills Act any part of a will cancelled by a testator became thereby revoked, but cancellation does not now revoke any part of a will unless the will is afterwards re-executed (*z*); for the words "otherwise destroying" only include acts of a nature similar to those just before enumerated. This rule must often have disappointed the intention of testators who had imagined that they had sufficiently revoked the whole or part of their wills. For instance, a will was held valid in

(*u*) *Stoddart* v. *Grant*, 19 L. T. 305.
(*v*) *Simpson* v. *Foxon* [1907] P. 54.
(*w*) *Re Sinclair*, 3 Curt. 746.
(*x*) *Wood* v. *Wood*, L. R. 1 P. & M 309.
(*y*) *Re Durance*, L. R. 2 P. & M. 406.
(*z*) Sug. Wills. 47.

one case (*a*), notwithstanding that the whole body of the will was struck through with a pen, the name of the testator crossed out, and the attestation clause and the names of the witnesses likewise run through with a pen; and in another case (*b*), notwithstanding that the testator had written the word "cancelled" across his signature, and added a written declaration that the will in question was revoked, and that he intended to make another will. And the fact that a testator, besides cancelling his will, had thrown it away amongst a heap of waste papers, has been held to make no difference (*c*). But if the testator tears off the signatures of the testator and witnesses the will is revoked (*d*); and of course a complete obliteration of any part of an executed will revokes that part, such a case coming within the provisions of section 21 of the Wills Act, which give effect to alterations so made, that words contained in the will before such alteration are no longer apparent.

How destruction must be accomplished.

As to the various modes of destroying a will which are mentioned in the Act, it is to be observed that there are two things requisite to make them effectual revocations. The first is that the destruction, if not the act of the testator himself, must be in his presence as well as by his direction. Thus, where a person who had made a will, afterwards in the presence of two witnesses expressed a wish to revoke it, and desired them to take it into another room and burn it, which was done, it was held that this did not amount to a revocation, and probate was accordingly granted of a draft copy of the will (*e*). And, of course, the destruction of a will after the testator's death, although done in pursuance of his written request to that effect, is inoperative as a revocation of the will (*f*). The other point is, that the destruction of a will must, in order to be effectual, be accompanied by an intention on the part of the testator to

(*a*) *Stephens* v. *Taprell*, 2 Curt. 458.
(*b*) *Re Brewster*, 6 Jur. N. S. 56.
(*c*) *Cheese* v. *Lovejoy*, 2 P. D. 251.
(*d*) *Bell* v. *Fothergill*, L. R. 2 P. & M. 148.
(*e*) *Re Dadds*, 29 L. T. 99; and see *Rooke* v. *Langdon*, 2 L. T. 495.
(*f*) *Stockwell* v. *Ritherton*, 1 Rob. 661, 667.

revoke it. Hence, where a testator tore up his will under a mistaken impression that it was invalid, and then on second thoughts collected and preserved the pieces, it was held that there had been no revocation of the will (*g*). It must also be clearly proved that the intention to revoke existed at the time of the will being destroyed; subsequent declarations by a testatrix that she had destroyed her will with the intention of revoking it having been held insufficient (*h*). The Court will, however, presume that a will which has remained in the custody of a deceased person until the time of his death, and the non-existence of which at his death is clearly proved (*i*), has been revoked by him during his lifetime, but this presumption may be rebutted by parol evidence to the contrary (*j*). But if a will has been lost, and the Court is of opinion that it has not been intentionally destroyed by the testator, verbal evidence may be given as to its contents, and such evidence may consist of declarations made by the testator, or of statements by a witness who has seen the will and remembers its contents (*k*).

Dependent relative revocation.

If the testator destroys his will merely in order to substitute another for it, then if the other is not in fact substituted or if it proves void, the will is not revoked (*l*). Thus if a man made a will in 1918, and then made another will in 1920, and then destroyed the will of 1920, stating that he did so with the intention of reviving the will of 1918, the will of 1918 is not revived; but if A dies without making a fresh will, the will of 1920 can be admitted to probate, if its contents can be proved by a copy or other evidence, because A's destruction of it was relative to and dependent on his belief that the first will would be revived.

It may be added here that whereas formerly a codicil was revoked whenever the will to which it belonged was revoked,

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(*g*) *Giles* v. *Warren*, L. R. 2 P. & M. 401.
(*h*) *Re Weston*, L. R. 1 P. & M. 633.
(*i*) *Finch* v. *Finch*, L. R. 1 P. M. 371.
(*j*) *Eckersley* v. *Platt*, L. R. 1 P. & M. 281, 284; *Drake* v. *Sykes*, 22 T. L. R. 741.
(*k*) *Sugden* v. *St. Leonards*, L. R. 2 P. & M. 154.
(*l*) *Dixon* v. *Solicitor to the Treasury* [1905] P. 42.

a codicil now takes effect independently of a will, unless revoked by one of the modes indicated by the Wills Act. Thus, in one case, a testator had executed a will and a codicil to that will, and after his death his will, not being forthcoming, was presumed to have been revoked: it was held, nevertheless, that the codicil having been duly executed, must be admitted to probate as a will (*m*). Neither does a codicil revoking a will necessarily revoke a prior codicil to that will. Where a testator had made a will and two codicils, and afterwards, by a third codicil, revoked the will except as to a bequest stated to have been made by it, the two codicils remained valid, notwithstanding the revocation of the will (*n*).

Revival of a will.

The sections of the Act which have been referred to on the subject of revocation are completed by another (*o*) which provides that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in the manner required by the Act, and showing an intention to revive the same; and that when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown. Under the old law, if a man made a will, and then a second will revoking the first, and afterwards revoked the second, it would be presumed, if the first remained in existence, that the testator had intended to give it the same effect as if it had never been revoked (*p*). The Wills Act requires either that the will should be re-executed, which is tantamount to making a new will in the same terms, or, where the will is revived by a codicil, that the intention of which it speaks should appear on the face of the codicil,

Former rule as to revival.

Change made by the Act.

(*m*) *Black* v. *Jobling*, L. R. 1 P. & M. 685; and see *Re Savage*, L. R. 2 P. & M. 78; *Re Turner*, L. R. 2 P. & M. 403.
(*n*) *Farrer* v. *St. Catharine's College Cambridge*, L. R. 16 Eq. 19.
(*o*) S. 22.
(*p*) *Goodwright* v. *Glazier*, Burr. 2512.

either by express words referring to the will as revoked and importing an intention to revive it, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying with reasonable certainty the existence of the intention in question. In other words, it was designed by the statute to do away with the revival of wills by mere implication (*q*). Therefore the fact that a codicil refers to a previous revoked will is not a sufficient indication of an intention to revive that will, when it appears from the codicil itself that the reference to the will was made by mistake (*r*). Neither can a codicil revive a will which has been destroyed with the intention of revoking it, for in that case the will has ceased to exist both in law and in fact, and a will or codicil cannot incorporate or revive a document which has no existence at the time when the will or codicil is executed (*s*).

Lastly, it may be mentioned that, just as a codicil is not necessarily revoked by the revocation of the will to which it belongs, so it is not, after having been revoked, revived by another codicil reviving the will, unless the subsequent codicil shows an intention to revive the revoked codicil as well as the will (*t*). On the other hand, a codicil revoking part of a will is not, in its turn, revoked by a subsequent codicil confirming the will: the effect of the subsequent codicil being to confirm the will only so far as is consistent with the revoking codicil (*u*).

Appointment of executor.

A few words may be added as to the appointment and powers of executors.

The appointment of an executor or executors of the will is now usually inserted at the commencement instead of, as

(*q*) *Re Steele*, L. R. 1 P. & M. 575, 578.
(*r*) *Re Wilson*, L. R. 1 P. & M. 582; and see *Deakin* v. *Garvie*, 35 T. L. R. 680.
(*s*) *Hale* v. *Tokelove*, 2 Rob. 318; *Newton* v. *Newton*, 5 L. T. (N.S.) 218; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342, 350; *In the goods of Reade* [1902] P. 75.
(*t*) *Re Reynolds*, L. R. 3 P. & M. 35.
(*u*) *Green* v. *Tribe*, 9 Ch. D. 231.

formerly, at the end of the will. If two or more executors are appointed and one dies, the office vests in the surviving executors; but if a sole executor dies after proving the will, his office is transmissible to his executor. If he dies before probate, or if he has no executor, an administrator to the original testator must be appointed.

The duty of an executor is to prove the will and to administer the estate; he becomes the representative of the testator after his death, and in the executor has always vested the testator's personal property and all his rights of action and all his liabilities that do not die with him. But before the Land Transfer Act, 1897, the testator's real property did not vest in the executor, but passed direct to the devisee; and a will dealing solely with real estate could not be admitted to probate.

Operation of Land Transfer Act, 1897.

The Land Transfer Act, 1897, provides (*v*) that where a man dies (testate or intestate) after 1897 all the real estate vested in him without a right in any other person to take by survivorship (excepting copyholds or customary freeholds of which the deceased died tenant on the Court Rolls, but including property over which he has exercised a general testamentary power) vests on his death, notwithstanding any testamentary disposition, in his personal representatives or representative as if it were a chattel real. The personal representatives have to administer the real estate and they can therefore sell or mortgage it. By the Conveyancing Act, 1911, s. 12, the proving executors or executor alone can convey the real estate though the remaining executors have not renounced probate. The Act does not apply to the legal estate in copyholds; but if the testator had an equitable interest only in the copyholds, the Land Transfer Act, 1897, applies, and it passes to the executor or administrator in the first place (*w*). The Act does not apply to fees tail (*x*).

(*v*) 60 & 61 Vict. c. 65, s. 1.
(*w*) *Re Somerville and Turner's Contract* [1903] 2 Ch. 583.
(*x*) Elph. Conv. 584.

Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate (*y*).

The Act does not alter the rules for construction of wills, and the beneficial interest in property passes to the same persons as before the Act, but the legal estate does not pass to the devisee until the executor (or administrator if there is no executor) has assented to the devise.

The provisions above referred to of the Act of 1897 are not applicable to trust or mortgage estates which devolve to the personal representatives under the Conveyancing Act, 1881, s. 30.

(*y*) 60 & 61 Vict. c. 65, s. 1 (3).

CHAPTER VIII.

Conveyance by Registration (*a*).

Land Transfer Acts.

Attempts have been made from time to time to facilitate the transfer of land by a system of registration, *i.e.*, to secure a public record of the ownership of land and to enable the person whose name appears on the register to transfer his land as readily and cheaply as he can transfer his stocks and shares. The first Land Transfer Act was passed in 1862 (*b*), but proved a complete failure. The second Land Transfer Act was passed in 1875 (*c*), but as under this Act registration is voluntary and most owners of land declined to incur the cost of registration, the Land Transfer Act of 1897 (*d*) amended and extended the Act of 1875 by providing that registration of title should be compulsory in certain areas. The Statute enacts that the Crown may by Order in Council declare, as respects any county or part of a county mentioned or defined in the Order, that, on and after a day specified in the Order, registration of title to land is to be compulsory on sale, and thereupon a person shall not, under any conveyance on sale, executed on or after the day so specified, acquire the legal estate in any freehold land in that county, or part of a county, unless or until he is registered as proprietor of the land. Leases for forty years or more of land situate in a district where registration of title is compulsory on sale operate only as an agreement and do not pass any legal estate to the lessee unless or until he is registered under the Land Transfer Acts as proprietor of the lease; but this does not apply to a term of years

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(*a*) For further details on this subject, see Williams, Real Property, pp. 649-97.

(*b*) 25 & 26 Vict. c. 53.

(*c*) 38 & 39 Vict. c. 87.

(*d*) 60 & 61 Vict. c. 65.

created for mortgage purposes nor to a lease containing an absolute prohibition against alienation. Orders in Council have been made under the Act making registration compulsory in the County and City of London.

The register.

Under the Acts of 1875 and 1897 there is established an office of land registry with a registrar and other officials and a register of land consisting of three parts: (1) a property register; (2) a proprietorship register; (3) a charges register. The property register contains the description of the land with a reference to the general map, kept in the Registry, or to the filed plan of the land, and notes as to ownership of the mines and minerals, easements, restrictive covenants, etc. The proprietorship register states whether the title is absolute, qualified or possessory, and contains the names, addresses and description of the proprietor of the land, and cautions, inhibitions and restrictions affecting his right of disposing thereof. The charges register contains incumbrances and other rights affecting the land, and all dealings with registered charges and incumbrances. There are kept in the registry an "Index Map," showing the original title number of each registered property; a "Name Index," containing an up-to-date list of proprietors' names, and showing the registered numbers of the titles, charges, or incumbrances of the persons named as proprietors; an "Application Book," containing a list of pending applications for registration; a "General Map," consisting of a series of maps based on the Ordnance Map; and a "Parcels Book" containing the reference numbers of the parcels shown on the General Map. The index of proprietors' names is open to the inspection of registered proprietors only; but if any person satisfies the registrar that he is interested generally (*e.g.*, as the trustee in bankruptcy or executor or administrator of the proprietor) in the property of any proprietor he may inspect that index. The Index Map and Application Book, and the General Map and Parcels Book, are open to public inspection.

When registration is compulsory.

If the land is situated in the County and City of London registration of title is compulsory: (1) on sale of freehold

land; otherwise the purchaser will not acquire the legal estate; (2) on sale of a lease or under-lease having at least forty years to run or two lives yet to fall in, and on grant of a lease or under-lease for a term of forty years or more or for two or more lives and capable of registration; otherwise the assignment or grant will operate only as an agreement and will not pass any legal estate to the assignee or lessee.

The title with which a proprietor of land is registered in pursuance of the compulsory clause must not be less than a possessory title.

What property cannot be registered.

The following cannot be registered under the Land Transfer Acts: (1) Copyholds; (2) customary freeholds where admission is necessary to perfect the title of a purchaser from the customary tenant; (3) leaseholds of which less than twenty-one years are unexpired; (4) leaseholds held under a lease containing an absolute prohibition against alienation; (5) a lease created for mortgage purposes.

Registration of leases.

Land cannot be registered unless it is of freehold tenure or leasehold held under a lease which is either immediately or mediately derived out of land of freehold tenure. Hence leases and sub-leases of copyholds are not capable of being registered.

Leasehold land derived immediately or mediately out of freehold held under a lease of which more than twenty-one years, but less than forty years, are unexpired *may* (with the exceptions mentioned above in regard to leases containing an absolute prohibition against alienation and leases created for mortgage purposes), be registered, but registration is not compulsory in any case. If the land is situated in the County and City of London, sales of leases or under-leases having at least forty years to run and grants of leases or under-leases for a term of forty years or more (with the same exceptions) *must* be registered. If the lease has not more than twenty-one years to run, or if it contains an absolute

prohibition against alienation, or if it was created for mortgage purposes, it *cannot* be registered.

Who is entitled to apply for registration.

Registration can be applied for (and in each case whether the land is or is not subject to incumbrances) by the following persons, viz.: (1) A person who has contracted to buy for his own benefit the fee-simple, or lease, or sub-lease; provided that the vendor consents to the application; (2) a person entitled for his own benefit at law or in equity to the fee-simple, or lease, or sub-lease; (3) a person capable of disposing for his own benefit by way of sale of the fee-simple, or lease, or sub-lease; (4) a person holding land on trust for sale; (5) a trustee, mortgagee, or other person having power to sell the land. In cases (4) and (5) the application must be with the consent of any persons whose consent is required to the exercise by the applicant of his trust or power of sale (*e*).

Registration of settled land.

As tenants for life (otherwise than under a settlement by way of trust for sale), and persons having the powers of a tenant for life under the Settled Land Acts, have power to sell the land, they may apply for registration. The settled land may, at the option of the tenant for life, be registered either in his name, or, where there are trustees with a power of sale, in the names of those trustees; and there must also be entered on the register such restrictions or inhibitions as may be necessary for the protection of the persons beneficially interested in the land, *e.g.*, where the tenant for life is registered as proprietor an entry on the register that no sale of the mansion-house shown on the plan shall be made without the consent of the trustees or of the Court.

Titles which may be registered.

Land may be registered with: (a) an absolute title; or (b) a qualified title; or (c) a possessory title. Where registration is compulsory, registration with a possessory title only is sufficient.

(*e*) Elph. Conv. 654-5.

Absolute title.

The effect of first registration of freehold land with an absolute title is to confer on the person registered, who is called "the first registered proprietor," the fee-simple in the land subject (1) to the incumbrances, if any, entered on the register; and (2) to such liabilities, rights and interest, if any, as are by the Acts declared not to be incumbrances (*e.g.*, succession and estate duties, easements and *profits à prendre*, leases for any term not exceeding twenty-one years where there is an occupation under the tenancy), unless there is any entry to the contrary in the register; and (3) where the first registered proprietor is not entitled to the land registered for his own benefit as between himself and persons claiming under him, to any unregistered estates, rights, interests or equities to which such persons may be entitled (*e.g.*, such as a *cestui que trust* may possess where the trustee is registered proprietor); but free from all other estates and interests whatsoever, including estates and interests of the Crown.

"Good" leasehold title.

The effect of first registration of leasehold land with absolute title is to vest in the first registered proprietor the possession of the land comprised in the lease for all the leasehold estate therein described, subject to the qualifications (1), (2) and (3) above mentioned in the case of freehold land, and subject also to all implied and express covenants, obligations, and liabilities incident to such leasehold estate, but free from all other estates and interests whatsoever, including estates and interests of the Crown. An absolute title cannot be registered in respect of leasehold land until and unless the title both to the leasehold and the freehold, and to any intermediate leasehold that may exist, is approved by the registrar; but a person can be registered as proprietor of leasehold land with "good" leasehold title if the title to the leasehold is approved by the registrar. The effect of first registration of leasehold land with a good leasehold title has the same effect as registration with an absolute title, except that it does not affect or prejudice the enforcement of any estate, right or interest affecting or in derogation of the title of the lessor to grant the lease.

Qualified title.

Where on examination it appears to the registrar that the title can be established only for a limited period, or subject to certain reservations, an entry may be made on the register qualifying the title accordingly. A title of this nature is called a qualified title; and the entry has the same effect as registration of an absolute title, save that it does not affect the enforcement of any estate, right, or interest appearing by the register to be excepted. A qualified title is the only title which can be registered in respect of leasehold land held under a lease containing a prohibition against assigning without licence.

Possessory title.

The registration of the first registered proprietor with a possessory title only does not affect or prejudice the enforcement of any estate, right or interest, adverse to or in derogation of his title, and subsisting or capable of arising at the time of registration, but subject thereto has the same effect as registration with an absolute title.

Registration has not necessarily the effect of vesting the legal estate in the property in the registered proprietor, unless, in the case of land registered with an absolute title, there are no incumbrances entered in the register as affecting the property. In any case, an incumbrancer, whose rights are preserved, does not lose the legal estate if it is vested in him at the time of registration (*f*).

Mode of application for first registration.

Application for first registration must in ordinary cases be made by delivering at the registry an application in one or other of the forms prescribed by the Rules of 1908 (made under the provisions of the Land Transfer Acts) stating whether an absolute or possessory title is required. The application must be accompanied (unless the Registrar otherwise direct) by (1) all such original deeds and documents relating to the title as the applicant has in his possession or under his control, including opinions of counsel, abstracts of title, contracts for or conditions of sale, requisitions, replies and other like documents, in regard to

(*f*) Elph. Conv. 657.

the title; (2) a copy or sufficient abstract of the latest document of title, not being a document of record; and (3) sufficient particulars, by plan or otherwise, to enable the land to be fully identified on the Ordnance Map or Land Registry General Map. Also a list in duplicate of all documents so delivered. If the land is leasehold, the lease, where it is in the possession or control of the applicant, and in other cases a copy or abstract thereof, or other sufficient evidence of its contents, must be delivered with the application.

Examination of title on first registration.

Where the applicant has no documents of title in his possession or under his control, and the registrar is satisfied that he is in possession or receipt of the rents and profits of the land, a statutory declaration by him as to the time for which he and his predecessors have been in such possession or receipt may be taken as *prima facie* evidence of his right to apply for registration as first proprietor.

The prescribed forms of application for first registration include declarations to the effect that a full disclosure of incumbrances of all kinds affecting the title to the land and of all facts material to such title has been made.

All incumbrances, etc., to which the land is subject are to be entered on the register whether the title registered be absolute, qualified or possessory.

Where the application is for an absolute title, the title will be examined by the registrar, or by an examiner of titles, in accordance with the usual conveyancing practice, but the examination may be modified as the registrar thinks fit where (1) the land has been sold or purchased under an order of the Court; or (2) has been registered with a possessory or qualified title for six years, the first proprietor having been a purchaser on sale; or (3) it shall appear to the registrar that the title has been sufficiently investigated on a transaction for value. Except in certain cases specified in the Rules of 1908 (*i.e.*, where the applicant is a purchaser on a sale, completed within the year preceding the applica-

tion, of land in a compulsory district or the applicant is an original lessee), an advertisement must be inserted in the *London Gazette* and in certain newspapers before any registration can be completed with an absolute title. Any person may object to the registration, and any such objection is to be heard and decided by the registrar subject to appeal to the Court.

No registration with absolute title can be made until and unless the registrar approves of the title, but the registrar has power to accept a good holding title.

Where the application is for a possessory title, and the documents afford *primâ facie* evidence of the applicant's right to apply for registration as first proprietor, the registration will be completed with possessory title accordingly; but the registrar may, if he observes that the documents produced are sufficient to enable registration to be made with an absolute title, inform the applicant that he proposes to convert the title into an absolute title, and may, if the applicant does not object, convert the title into an absolute title accordingly.

Land certificate.

Whatever be the nature of the title with which the land is registered, on completion of the registration a land certificate is handed to the applicant or, if he prefers, deposited in the registry.

The land certificate is the only document of title to registered land. It contains a description of the land, the nature of the title with which it is registered, *i.e.*, absolute, qualified, good leasehold, or possessory, and copies of the register and of the filed plan if any. The land certificate, if not deposited in the registry, must be produced to the registrar on every entry in the register of a disposition by the registered proprietor, and a note of such entry officially indorsed thereon.

The registered proprietor may deal with the land either by registered or by unregistered assurance. Registered assurances are (1) transfers; (2) charges.

Registered transfers.

A transfer of the land is made by an instrument of transfer drawn up in the form prescribed by the Rules, executed as a deed in the presence of and attested by a witness, who must sign his name and add his address and description, and duly stamped. The instrument of transfer must be produced to the registrar for registration and will be retained by him. It must be accompanied by the land certificate, unless that is deposited in the registry. The transaction is completed by entering in the register the name of the transferee as proprietor of the land transferred, and making a note of such entry on the land certificate. If the whole of the land comprised in the title is transferred, either a new land certificate or the old land certificate made up to date is delivered to the transferee. If part only is transferred, a new land certificate is delivered to him and the old certificate is retained by the transferor.

Effect of registered transfer for value.

A registered transfer for value of freehold land, registered with an absolute title, confers on the transferee an estate in fee-simple in the land subject (1) to the incumbrances, if any, registered in the register; and (2) unless the contrary is expressed in the register, to such liabilities, rights and interests as are by the Acts declared not to be incumbrances, but free from all other estates and interests, including those of the Crown.

A registered transfer for valuable consideration of freehold land registered with a qualified or with a possessory title has the same effect, save that, in the case of a qualified title, it does not affect the rights or interests appearing by the register to be excepted, and, in the case of a possessory title, does not affect any right or interest adverse to the title of the first registered proprietor and subsisting or capable of arising at the time of the registration of such proprietor.

Effect of registered transfer of freeholds made without valuable consideration.

A registered transfer of freehold land made without valuable consideration is, so far as the transferee is concerned, subject to any unregistered estates, rights, interests, or equities, subject to which the transferor held the same,

but in other respects has the same effect as a transfer for value.

Effect of registered transfer of leasehold land.

Registered transfers of leasehold land have the like effect, according as they were made with or without valuable consideration and the title registered was absolute, good leasehold, qualified or possessory, but instead of conferring an estate in fee-simple they shall be deemed to vest in the transferee the possession of the land transferred for all the leasehold estate described in the registered lease subject (1) to all implied and express covenants, obligations and liabilities incident to such estate; (2) to all incumbrances entered on the register; and (3) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the leasehold estate and are by the Acts declared not to be incumbrances in the case of registered freehold land. And transfers of leasehold land registered with a good leasehold title shall not affect or prejudice the enforcement of any estate, right or interest affecting or in derogation of the lessor's title to grant the lease.

A registered transfer of leasehold land implies, unless there is an entry to the contrary on the register, a qualified covenant by the transferor that the rent, covenants by the lessee, and conditions, reserved and contained by and in the lease, have been paid, performed, and observed up to the date of the transfer, and a covenant by the transferee for payment of the rent and performance of the covenants by the lessee and conditions, and for indemnity of the transferor in respect thereof.

Transmission of registered land or charge on death or bankruptcy.

On the production of probate or letters of administration of a sole registered proprietor or of the survivor of several joint registered proprietors of land or a charge dying after 1897, his personal representatives are to be registered as proprietors with the addition "executors or administrators of —— deceased." Provision is also made for the registration of a devisee or legatee as proprietor with the personal representative's assent without the prior registration of the

personal representatives. If the deceased proprietor died intestate, the heir in the case of freeholds, and any person entitled under the Statute of Distributions in the case of leaseholds or a charge, may be registered as proprietor upon a transfer from the administrator.

On the bankruptcy of the registered proprietor of land or a charge, the official receiver or trustee in bankruptcy is entitled to be registered in his place.

Registered charges.

A registered charge is created by the registered proprietor executing a deed in a form provided by the Rules, and by the entry on the register of the creditor to whom the charge is made as proprietor of the charge. On completion, a certificate of charge is delivered to him or, if he prefers, deposited in the registry. Before issuing the certificate the registrar may require from the creditor a signed statement as to whether he will allow the land certificate to remain in the custody of the registered proprietor of the land during the continuance of the charge, and unless a statement to the effect that the creditor will allow it to remain in his custody is lodged, the certificate of charge will consist merely of an office copy of the charge endorsed with a certificate of its registration.

Subject to any entry to the contrary on the register, a covenant is implied by the person who is registered proprietor of the land at the date of the charge to pay the principal and interest (if any) at the appointed time, and in default to pay interest half-yearly, and also in the case of leaseholds to pay the rent and perform or observe the covenants and conditions of the lease, and to indemnify the proprietor of the charge and persons claiming under him against them.

Subject to any entry to the contrary on the register, the registered proprietor of a registered charge has the following remedies besides that of suing on the implied covenants: (1) Right of taking possession, subject to the right of any

persons appearing on the register to be prior incumbrancers and to the liability attached to a mortgagee in possession; (2) to foreclose; (3) to exercise the powers conferred on mortgagees by the Conveyancing Act, 1881, *i.e.*, power of sale, power to appoint a receiver, etc.

Disadvantage of registered charge as compared with an ordinary mortgage.

A legal mortgagee of unregistered land has the legal estate in the mortgaged land. On foreclosure, therefore, he retains the legal estate which he had before, discharged, however, from the mortgagor's equity of redemption. If he takes possession of the mortgaged lands and remains in possession for twelve years without giving any written acknowledgment of the mortgagor's title or right to redemption, the equity of redemption will be *ipso facto* extinguished. But the mortgagee under a registered charge does not obtain the legal estate, although he has the legal *interest* given by the charge. On foreclosure he can obtain no more than the equitable estate in the land charged, though he will apparently obtain the legal estate or subsequent registration of himself as proprietor of the land. If he takes possession under his statutory right to enter, and remains in possession for twelve years, the equity of redemption is not barred without any further act on his part, but he must apply to the Court on this ground for an order for rectification of the register, and the Court has a discretion whether it will make the order or not, and if the discretion is exercised in his favour his estate will be subject to any estates or rights acquired by registration for valuable consideration, and in any case he must pay the costs of his application out of his own pocket. If the land charged were let on lease previously to the charge, it is doubtful whether the holder of the registered charge is in the position of an assignee of the reversion and so enabled to enforce the lessee's covenants and the conditions of re-entry contained in such leases. Hence a person advancing money on the security of registered freehold land sometimes insists on having a conveyance made to him of the mortgagor's *estate* in the land to be charged. This may be done (1) by a registered transfer of the land to the mortgagee, the mort-

gagee being registered as proprietor, and the mortgagor's right of redemption being secured to him by an unregistered deed and protected by a caution to be lodged by him; or (2) by an unregistered deed of mortgage in the old form, the mortgagee taking in addition a registered charge on the land, and also procuring a restriction to be entered in the register against any dealings with the land by the mortgagor, which would extinguish or impair the legal estate so granted to the mortgagee (*g*).

Transfer of registered charge.

The registered proprietor of a charge may transfer the charge by a deed in the form provided by the Land Transfer Rules. He must produce the certificate of charge to the registrar, and the operation is completed by the name of the transferee being entered on the register as proprietor of the charge. On such entry being made, the certificate of charge is indorsed therewith and delivered to the transferee, or, if he prefers, deposited in the registry.

Priorities of registered charges.

Subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created.

Discharge of registered charge.

The cessation of a registered charge must be notified on the register at the requisition of the registered proprietor of the charge, or on due proof of the satisfaction thereof, by cancellation of the original entry or otherwise; and thereupon the charge shall be deemed to have ceased.

Deposit of land certificate or certificate of charge.

The registered proprietor of freehold or leasehold land or of a charge may, subject to any registered estates, charges, or rights, create a lien on the land or charge by deposit of the land certificate or certificate of charge. Such lien is equivalent to a lien created by the deposit of title-deeds or of a mortgage deed of unregistered land by an owner

(*g*) Williams' Real Property, 688-91.

entitled in fee-simple, or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage.

The depositee may, if the deposit is to secure money, give notice to the registrar of the deposit; and such notice shall be entered on the Charges Register and shall operate as the lodgment of a caution.

Unregistered assurances.

The Land Transfer Act, 1875, s. 49, provides that, subject to the maintenance of the estate and right of any registered proprietor, any person having a sufficient estate or interest in registered land may create estates, rights, interests, and equities in the same manner as if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities, in registered land may protect the same from being impaired by any act of the unregistered proprietor by entering on the register notices, cautions, inhibitions, or restrictions.

The meaning of this section appears to be that no unregistered assurance, whether made by the registered proprietor or a stranger, will prevent the registered proprietor from dealing with the land, or charge, by registered assurance, except so far as he may be prevented from so doing by a registered notice, caution, inhibition or restriction (*h*).

Notices.

Provision is made for entry in the register of incumbrances prior to registration, and of notice of such liabilities, rights and interests as are by the Acts declared not to be incumbrances (*e.g.*, succession duty, estate duty, rights of common, leases not exceeding twenty-one years), and of a deposit of the land certificate or a certificate of charge.

Besides this, any lessee or other person entitled to or interested in a lease or an agreement for a lease of registered

(*h*) Elph. Conv. 669.

land, where the term granted is for or determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with the lease or agreement, may apply for registration of notice of the lease or agreement. On the entry of such notice the registered proprietor of the land and every person deriving title under him (except proprietors of incumbrances registered prior to the registration of the notice) are deemed to be affected with notice of the lease or agreement as being an incumbrance on the land. Such notice cannot be registered without the concurrence of the registered proprietor of the land, except under an order of the Court.

Notices of estates in dower and by the curtesy may be noted as incumbrances.

Caution against registration of unregistered land.

A caution against first registration of land may be lodged by any person having or claiming such an interest in the land as entitles him to object to any disposition thereof being made without his consent. This would entitle him to notice of any application for registration of the lands. The effect of the caution is to prevent any registration of the land being made until the lapse of fourteen days from the service of notice on the cautioner, or the cautioner has entered an appearance to oppose such registration, whichever may first happen.

A mortgagee of unregistered land should lodge a caution against first registration, as if the land is registered after the mortgage the mortgagee will be unable to convey the land to a purchaser by registered assurance without obtaining the land certificate. On the mortgagee being warned, he can take steps to have himself registered as proprietor of the mortgage when the land is registered (*i*).

Caution against registered dealings.

Any person interested under any unregistered instrument or as a judgment creditor, or otherwise, in any land or

(*i*) Elph. Conv. 671.

charge registered in the name of any other person may lodge a caution to the effect that no dealing be had by the registered proprietor until notice has been served on the cautioner warning him that his caution will cease to have any effect after the expiration of fourteen days or such shorter period, not less than seven days, as the registrar may direct. At any time before the expiration of such period, the cautioner may show cause why the caution should continue to have effect, or why the dealing should not be registered—as, for instance, that it has been obtained by fraud or mistake, or that it is inconsistent with a prior dealing or with some adverse right or equity.

Inhibitions.

An inhibition is an order or entry inhibiting for a time, or until the occurrence of an event named in the order or entry, or generally until further order or entry, any dealing with any registered land or registered charge. It may be granted by the Court, or, subject to an appeal to the Court, by the registrar, on the application of any person interested. An inhibition would be placed on the register if the proprietor was a married woman restrained from anticipation; or if the proprietor is a tenant for life and there are no trustees of the settlement.

Restrictions.

A restriction is an entry on the register, made on the application of the registered proprietor of land or of a charge, that no transfer of the land or charge shall be made unless the following things, or such of them as the proprietor shall determine, are done, that is to say: (1) Unless notice of any application for a transfer or charge is sent by post to a named address; (2) unless the consent of some person or persons named by the proprietor is given to the transfer or charge; or (3) unless some other matter or thing is done which may be required by the applicant and approved by the registrar. Restrictions can at any time be withdrawn or modified at the instance of all persons appearing by the register to be interested in such directions, and may be set aside by order of the Court.

Thus where a tenant for life is registered as proprietor and there are trustees for the purposes of the Settled Land Acts, restrictions are entered that, except under an order of the registrar, no transfer of the land is to be made except on sale or exchange, the purchase moneys on sale being paid to such trustees or into Court, and no transfer is to be registered of the principal mansion-house and lands usually occupied therewith without the consent of the trustees or an order of the Court.

Sale of unregistered land in compulsory district.

Where unregistered land, in a district where registration is compulsory, is purchased, the title will be investigated by the purchaser in the same manner as if it were not intended that the purchaser should be registered. It might be advisable for the purchaser, as soon as the contract is executed, to lodge a caution against first registration, so as to avoid the risk of losing his lien for his deposit on the vendor selling to another person who has no notice of the contract. The conveyance will be in the ordinary form. The index map and application book should be inspected at the registry for the purpose of ascertaining that the land has not been already registered and that no application for registration is pending; and inquiry should be made whether any caution against first registration has been lodged. The sale can then safely be completed but application for first registration should be made (*j*).

Sale of registered land.

On the sale of registered land, registered with a possessory title, the purchaser must investigate the title prior to first registration, and all estates and interests arising thereout, in the same manner as if the land were not registered; but so far as regards the interest of the registered proprietor, he need only see that the vendor is registered as to the land which he sells. The Land Transfer Act, 1897 (*k*), provides that if the land is registered with a possessory title, the purchaser can require such evidence of the title subsisting or capable of arising at the first registration of the land as

(*j*) Elph. Conv. 674. (*k*) 60 & 61 Vict. c. 65, s. 16, sub-s. 1.

the purchaser would be entitled to if the land were unregistered. Therefore a person buying land from a person who is registered as proprietor with possessory title need only investigate the title so far as to ascertain that all interests adverse to the estate of the first registered proprietor have been got in or will be conveyed to him, and can then safely take a registered transfer from the registered proprietor without making any further investigation of title. Immediately the contract is signed the purchaser should lodge a caution against dealings with the land. The purchaser should require the vendor to give him authority to inspect the register, and the register should be searched immediately before completion. An official search can be obtained. If the search shows that any caution affects the land, it must be warned, and completion delayed until the notice to the cautioner has expired or the caution is withdrawn. If a restriction or inhibition is found, the transfer must be made in accordance thereto. If the search is satisfactory, the purchaser can safely complete on having the land certificate handed to him or lodged in the registry.

On the sale of land registered with an absolute title, the only investigation of title necessary is that of incumbrances entered on the register as subsisting at the first registration of the land. The Act of 1897 provides that the purchaser is entitled to evidence of the title to those incumbrances or evidence of their discharge from the register.

Where the proprietor of the land is registered with a qualified title, the Land Transfer Act, 1897, provides that the purchaser is entitled to the same evidence as above provided in the case of absolute title, and such evidence as to any estate, right, or interest excluded from the effect of the registration as a purchaser would be entitled to if the land were unregistered.

Whatever be the nature of the title the purchaser is entitled to a statutory declaration as to the existence or otherwise of matters which are declared by the Land Transfer Acts of 1875 and 1897 not to be incumbrances.

STUDENTS'
PRECEDENTS IN CONVEYANCING.

PART I.

MODERN FORMS.

I.

CONVEYANCE *of* FREEHOLDS *by a Vendor seised* IN FEE SIMPLE *to a Purchaser, without* RECITALS.

THIS INDENTURE, made the 10th day of August, 1920.

BETWEEN Sir Andrew Ambler of, &c. (*a*), Baronet, of the one part, and Beaven Collier of, &c. (*a*), Gentleman, of the other part, — Parties.

WITNESSETH that, in consideration of the sum of £10,000 now to the said Andrew Ambler paid by the said Beaven Collier (the receipt whereof is hereby acknowledged) the said Andrew Ambler AS BENEFICIAL OWNER hereby GRANTS unto the said Beaven Collier — Witnesseth. Consideration. Receipt. Operative words.

ALL THAT farm known as Eridge Farm, situate in the parish of St. John, in the county of Kent, and containing 130*a*. 2*r*. 4*p*., be the same a little more or less: — Parcels.

TO HAVE AND TO HOLD (*b*) the same UNTO AND TO THE USE OF the said Beaven Collier, his heirs and assigns (*c*). — Habendum.

(*a*) Here would be put the address.

(*b*) The words "to hold" alone are often used.

(*c*) In conveyances executed after 1881 the words "in fee-simple" may be used instead of the words "his heirs and assigns." See Conv. Act, 1881, s. 51.

Testimonium. IN WITNESS whereof the said parties hereto have hereunto set their respective hands and seals the day and year first above written (*d*).

II.

CONVEYANCE *of* FREEHOLDS *by a Vendor seised* IN FEE SIMPLE *to a purchaser, with* RECITALS.

Date. THIS INDENTURE, made the 2nd day of March, 1920,

Parties. BETWEEN J. V., of, &c., Esquire, of the one part, and the Rt. Hon. William, Earl of Z. (*a*), of the other part;

Recitals.

(i.) Narrative—of title of vendor. WHEREAS by an indenture dated the 12th day of April, 1900, and expressed to be made between J. B. of the first part, F. G. of the second part, A. B. of the third part, the said J. V. of the fourth part, and K. M. of the fifth part, the hereditaments hereby assured were (together with other hereditaments) granted to the use of the said A. B. and his assigns during his life with remainder to the use of the said J. V., his heirs and assigns;

AND WHEREAS the said A. B. died on the 21st day of July, 1915;

(ii.) Introductory; contract for sale. AND WHEREAS the said J. V. has agreed with the said Earl of Z. for the sale to him for the sum of £10,000 of the hereditaments hereby assured in fee-simple in possession free from incumbrances;

Witnesseth. NOW THIS INDENTURE WITNESSETH that, in pursuance of

Consideration. the said agreement, and in consideration of the sum of £10,000 now paid by the said Earl of Z. to the said J. V.

(*d*) Where the consideration does not exceed £500, and the conveyance is not a part of a larger transaction in respect of which the consideration exceeds that sum, a statement as follows should be inserted at the end of the deed before the testimonium "and it is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds £500." The object of this is to avoid the increased stamp duty otherwise payable under the Finance (1909-10) Act, 1910, s. 73.

(*a*) In the case of a peer the address is usually omitted; Elph. Conv. 64.

(the receipt whereof the said J. V. doth hereby acknowledge), he the said J. V. AS BENEFICIAL OWNER doth hereby GRANT UNTO the said Earl of Z. Receipt. Operative words.

ALL THAT messuage or farm-house and farm with the several parcels of land belonging thereto known as L. Farm, situate in the parish of M., in the county of N., and particularly described in the first schedule hereto, and delineated in the plan drawn on these presents and thereon coloured pink; Parcels.

TO HAVE AND TO HOLD the same premises UNTO AND TO THE USE OF the said Earl of Z., his heirs and assigns;

AND the said J. V. hereby acknowledges the right of the said Earl of Z. to production and delivery of copies of the documents of title which are mentioned in the second schedule hereto, and hereby undertakes for the safe custody of such documents. Acknowledgment and undertaking.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

[*Schedule of Parcels.*]

THE SECOND SCHEDULE ABOVE REFERRED TO.

[*Schedule of Documents retained by Vendor.*]

III.

CONVEYANCE *of* FREEHOLDS *by* MORTGAGOR AND MORTGAGEE *to a Purchaser.*

THIS INDENTURE, made the —— day of ——, 19—,

BETWEEN A. of, &c. [*mortgagee*], of the first part, B. of, &c. [*mortgagor*], of the second part, and C. of, &c. [*purchaser*], of the third part: Parties (*a*).

WHEREAS by an indenture of mortgage dated, &c., and expressed to be made between the said B. of the one part and the said A. of the other part, in consideration of the sum of £1,000 paid by the said A. to the said B., the hereditaments hereinafter described and intended to be Recitals: Mortgage in fee;

(*a*) As to the order of parties, see Elph. Conv. 67.

hereby assured were conveyed by the said B. unto and to the use of the said A., his heirs and assigns, by way of mortgage for securing the payment to the said A., his executors, administrators, or assigns, of the said sum of £1,000 with interest for the same as therein expressed;

state of mortgage debt;

AND WHEREAS the said sum of £1,000 still remains owing to the said A. on the security of the said indenture of mortgage, but all interest thereon has been paid up to the date of these presents (*b*);

contract for sale;

AND WHEREAS the said B. has agreed with the said C. for the sale to him of the hereditaments hereby assured in fee-simple in possession free from incumbrances for the sum of £2,500;

agreement that mortgagee shall join.

AND WHEREAS it has been agreed that the said sum of £1,000 shall be paid to the said A. out of the said purchase-money, and that he shall join in these presents in manner hereinafter appearing;

Witnesseth.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said recited agreements, and in consideration of the sum of £1,000 to the said A. now paid by the said C. at the request of the said B. (the receipt whereof the said A. doth hereby acknowledge), and of the sum of £1,500 to the said B. now paid by the said C. (the payment and receipt respectively of which said sums of £1,000 and £1,500, making together the said purchase-money of £2,500, the said B. doth hereby acknowledge);

Consideration.

Receipt.

Operative words.

HE, the said A. AS MORTGAGEE (*c*) and by the direction of the said B., doth hereby GRANT, and HE the said B. AS BENEFICIAL OWNER, doth hereby GRANT AND CONFIRM unto the said C.;

ALL THAT [*parcels*];

Habendum.

TO HAVE AND TO HOLD the same premises UNTO AND TO THE USE OF the said C., his heirs and assigns, discharged from

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(*b*) If the conveyance is at a date not coinciding with one of the days appointed by the mortgage deed for payment of interest, the amount of interest will be calculated up to the date of the conveyance, and paid separately to the mortgagee.

(*c*) These words imply a covenant against incumbrances by virtue of the Conv. Act, 1881, s. 7 (1) (*F*). See Elph. Conv. 107.

all principal moneys and interest intended to be secured by and from all claims and demands under the hereinbefore recited indenture of mortgage.

IN WITNESS, &c.

IV.

CONVEYANCE *by a* MORTGAGEE *under a* POWER OF SALE.

THIS INDENTURE, made the —— day of ——, 19—,

BETWEEN A. of, &c. [*mortgagee*], of the one part, and C. of, &c. [*purchaser*], of the other part: Parties.

WHEREAS by an indenture of mortgage [*reciting the mortgage, as above*, p. 277, *and where the mortgage contains an express power of sale* (*a*), *continuing*] and it was by the same indenture provided that [*set out fully the power of sale including the clause protecting purchasers from irregularities in the sale, and the receipt clause, if any, but not the clauses restricting the power of sale nor the trusts of the purchase-money*]; Recitals: Mortgage;

AND WHEREAS the said A. has agreed with the said C. for the sale to him of the hereditaments hereby assured in fee-simple in possession free from incumbrances for the sum of £2,000: contract for sale.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £2,000 now paid to the said A. by the said C. (the receipt whereof the said A. doth hereby acknowledge), HE, the said A., AS MORTGAGEE, in exercise of the power vested in him by virtue of the said recited indenture of mortgage [*or* "by virtue of the Conveyancing and Law of Property Act, 1881"], and of every other power enabling him in this behalf, doth hereby GRANT UNTO the said C., Witnesseth.

ALL THAT [*parcels*],

(*a*) If the mortgage contained no express power of sale, such power would be supplied formerly by Lord Cranworth's Act, 1860 (23 & 24 Vict. c. 145), ss. 11, *et seq.*; and, in conveyances since 1881, by Conv. Act, 1881, ss. 19, *et seq.*

Habendum

To HAVE AND TO HOLD the said hereditaments and premises hereby assured UNTO AND TO THE USE OF the said C., his heirs and assigns, free from all right or equity of redemption and from all claims and demands under the said recited indenture of mortgage.

free from equity of redemption.

IN WITNESS, &c.

V.

CONVEYANCE *by* APPOINTMENT *under a Power of Sale in a Settlement.*

Parties.

THIS INDENTURE, made the —— day of ——, 19—, BETWEEN A. T. of, &c., and B. T. of, &c. [*trustees with power of sale*], of the first part, L. of, &c. [*tenant for life*], of the second part, and P. of, &c. [*purchaser*], of the third part:

Recitals: Settlement;

WHEREAS by an indenture of settlement, dated, &c., and expressed to be made between [*parties*] (being a settlement made in consideration of the marriage shortly afterwards solemnised between the said —— and ——), divers hereditaments, including the hereditaments hereinafter appointed, were limited to the use of the said L. and his assigns during his life, with divers remainders over; and by the said indenture it was provided that it should be lawful for the said A. T. and B. T., with the consent in writing of the said L., to sell the said hereditaments thereby limited, or any of them, and, for the purpose of effectuating such sale, with the consent aforesaid to revoke the uses thereby declared of the hereditaments so sold, and to appoint the same to the purchasers, or as they should direct; and it was thereby also declared that the receipts of the said A. T. and B. T. for the purchase-money should be sufficient discharges to the purchasers;

contract for sale.

AND WHEREAS the said A. T. and B. T., in exercise of the said power of sale, and with the consent in writing of the said L., have agreed with the said P. for the sale to him of the said hereditaments hereinafter appointed in fee-simple

in possession free from incumbrances, for the sum of £1,000;

NOW THIS INDENTURE WITNESSETH that, for effectuating the said sale, and in consideration of the sum of £1,000 to the said A. T. and B. T. now paid by the said P. (the receipt whereof the said A. T. and B. T. do hereby acknowledge), and in exercise of the said power given to the said A. T. and B. T. by the said indenture of settlement, THEY, the said A. T. and B. T., AS TRUSTEES (*a*), and with the consent and by the direction of the said L., directing as BENEFICIAL OWNER (*b*), do hereby REVOKE all the uses by the said indenture of settlement limited so far as relates to the hereditaments hereinafter appointed, AND do hereby APPOINT that

Witnesseth.
Considera-tion:
Receipt.
Revocation of uses and appointment to purchaser.

ALL THAT [*parcels*] shall henceforth go and remain TO THE USE OF the said P., his heirs and assigns:

PROVIDED THAT, as respects the reversion or remainder expectant on the life estate of the said L. in the said premises, and the title to and further assurance of the said premises, after his death, the covenant on his part in these presents implied by statute shall not extend to the acts, deeds, or defaults of any person or persons other than or beside himself and his own heirs, and persons claiming or to claim through or in trust for him, them, or some of them (*c*).

Proviso restricting liability of tenant for life under his implied covenants.

IN WITNESS, &c.

VI.

CONVEYANCE *by* TRUSTEES *for Sale under a Will*—RESERVATION *of a Right of Way*.

THIS INDENTURE, made the —— day of ——, 19—, BETWEEN A. T. of, &c., and B. T. of, &c. [*trustees*], of the one part, and P. of, &c. [*purchaser*] of the other part:

Parties.

(*a*) These words imply a covenant against incumbrances by virtue of Conv. Act, 1881, s. 7 (1) (*F*).

(*b*) These words imply covenants for title by virtue of Conv. Act, 1881, s. 7 (2).

(*c*) As to this proviso, see Elph. Conv. 168.

Recital of will:

WHEREAS K. S., late of ——, deceased, by his will dated the —— day of ——, 18—, after certain specific devises and dispositions not affecting the hereditaments hereby assured, gave and devised the residue of his freehold estates unto and to the use of the said A. T. and B. T., their heirs and assigns, upon trust for sale, and with power to give receipts as therein mentioned;

death of testator and probate;

AND WHEREAS the said K. S. died on the —— day of —— 18—, without having revoked or altered his said will, which was duly proved in the principal registry of the Probate Division of the High Court of Justice on the —— day of ——, 18—;

his seisin;

AND WHEREAS the said K. S. was at the time of his decease seised of (amongst other hereditaments) the freehold hereditaments and premises hereby assured for an estate in fee-simple in possession free from incumbrances;

contract for sale.

AND WHEREAS the said A. T. and B. T., as trustees of the said will, and in pursuance of the trust for sale therein contained as aforesaid, have agreed with the said P. for the sale to him of the said freehold hereditaments and premises, subject to such reservation as is hereinafter contained, for the sum of £1,000:

Witnesseth.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement for sale, and in consideration of the sum of £1,000 now paid to the said A. T. and B. T. by the said P. (the receipt whereof the said A. T. and B. T. do hereby acknowledge), THEY, the said A. T. and B. T., AS TRUSTEES, do hereby GRANT unto the said P.,

Grant;

Parcels;

ALL THAT [*parcels*],

Reservation of right of way.

EXCEPT AND RESERVING unto the said A. T. and B. T., their heirs and assigns, and other the owners and occupiers for the time being of the X. estate shown on the plan drawn on these presents, or of any part thereof, full and free right and liberty at all times hereafter, by day or by night, and for all purposes, with or without horses, carts, carriages or wagons, laden or unladen, to go, pass, or repass, and to drive cattle, sheep and other animals along, over, and upon the strip of land or road indicated on the said plan by dotted *red* lines;

To HAVE AND TO HOLD the said hereditaments and premises hereby assured (except and reserving as aforesaid) UNTO AND TO THE USE OF the said P., his heirs and assigns. Habendum.

IN WITNESS, &c.

VII.

BARGAIN AND SALE *of* FREEHOLDS *by Executors at Common Law* (*a*).

THIS INDENTURE, made the —— day of ——, 18—,

BETWEEN A. B. of, &c., and C. D. of, &c. [*executors*], of the one part, and J. P. of, &c. [*purchaser*], of the other part; Parties.

WHEREAS W. T., late of —— in the parish of —— in the county of ——, deceased, being seised in fee-simple of the hereditaments hereby bargained and sold, duty executed his last will, dated the —— day of ——, 18—, and thereby directed that his houses and lands at B. (being the said hereditaments) should be sold by his executors thereinafter named, and appointed the said A. B. and C. D. executors of his said will; Recital of will devising hereditaments to be sold by executors;

AND WHEREAS the said W. T. died on the —— day of ——, 18—, without having revoked or altered his said will, which was proved by the said A. B. and C. D. in the principal registry of the Probate Division of the High Court of Justice on the —— day of ——, 18—; of death of testator and probate;

AND WHEREAS the said A. B. and C. D., in pursuance of the direction for sale contained in the said will as aforesaid, have agreed with the said J. P. for the sale to him of the hereditaments hereby bargained and sold and the inheritance thereof in fee-simple in possession free from incumbrances, for the sum of £2,000: —of contract for sale.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of Witnesseth.

(*a*) As to a bargain and sale by executors at common law, see Elph. Conv. 94. In the case of persons dying after 1897, this form of conveyance on sale of freeholds is rendered obsolete by the powers conferred on executors by Part I. of the Land Transfer Act, 1897.

£2,000 now paid to the said A. B. and C. D. by the said J. P. (the receipt whereof the said A. B. and C. D. do hereby acknowledge), THEY, the said A. B. and C. D. AS SUCH PERSONAL REPRESENTATIVES (*b*) AS AFORESAID, and in pursuance of the direction for sale in the said will contained as aforesaid, and of every or any power enabling them in this behalf, DO respectively hereby BARGAIN AND SELL unto the said J. P.,

Bargain and sale.

ALL THOSE [*parcels*],

TO HOLD the same UNTO AND TO THE USE OF the said J. P., his heirs and assigns.

IN WITNESS, &c.

VIII.

CONVEYANCE *of* FREEHOLDS *by* TENANT FOR LIFE *under the* SETTLED LAND ACT, 1882, *to* JOINT TENANTS *or* TENANTS IN COMMON.

THIS INDENTURE, made the —— day of ——, 19—,

Parties.

BETWEEN T. L. of, &c. [*tenant for life*], of the first part, A. T. of, &c., and B. T. of, &c. [*trustees of the settlement*], of the second part, and P. of, &c., and Q. of, &c. [*purchasers*], of the third part:

Recitals of settlement;

WHEREAS by an indenture of settlement dated the —— day of ——, 18—, and expressed to be made between [*parties*], the hereditaments hereinafter described and expressed to be hereby assured were (together with other hereditaments) conveyed and settled to the use of the said T. L. and his assigns during his life with remainder over and the said A. T. and B. T. are by the said settlement declared to be trustees thereof for the purposes of the Settled Land Act, 1882:

of contract for sale.

AND WHEREAS the said T. L. by virtue of the powers vested in him under the Settled Land Act, 1882, has agreed with the said P. and Q. for the absolute sale to them of

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(*b*) These words imply a covenant against incumbrances by virtue of Conv. Act, 1881, s. 7 (1) (*F*).

the said hereditaments hereinafter described and the inheritance thereof in fee-simple in possession for the sum of £1,000:

Witnesseth.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said recited agreement and in consideration of the sum of £1,000 now paid by the said P. and Q. by the direction of the said T. L. to the said A. T. and B. T. as such trustees as aforesaid (the receipt whereof the said A. T. and B. T. do hereby acknowledge, and the payment whereof in manner aforesaid the said T. L. doth hereby acknowledge), the said T. L. AS BENEFICIAL OWNER (*a*) by virtue of the powers vested in him by the Settled Land Act, 1882, and of every or any other power in this behalf him enabling, DOTH hereby GRANT and convey UNTO the said P. and Q.

ALL THOSE [*parcels*],

TO HAVE AND TO HOLD the same UNTO AND TO THE USE of the said P. and Q., their heirs and assigns (*b*).

IN WITNESS, &c.

IX.

COVENANT TO SURRENDER COPYHOLDS *to a* PURCHASER.

THIS INDENTURE, made the —— day of ——, 19—.

Parties.

BETWEEN V., of, &c. [*vendor*], of the one part, and P., of, &c. [*purchaser*], of the other part:

Recital of seisin and contract for sale.

WHEREAS the said V. is seised for an unincumbered estate of inheritance to him and his heirs of the hereditaments hereby covenanted to be surrendered at the will of the lord according to the custom of the manor of X. in the county

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(*a*) A proviso restricting the liability of the tenant for life under his implied covenants for title is often added as in Precedent V., *supra*, p. 281.

(*b*) Under this limitation P. and Q. take as joint tenants in fee-simple. If the purchasers are to take as tenants in common, the limitation will be to the use of the said P. & Q. and their respective heirs and assigns as tenants in common "in equal shares" if they take equally, or "in the shares following, that is to say, as to [two] equal [third] parts thereof to the said P., his heirs and assigns, and as to the remaining equal [third] part thereof to the said Q., his heirs and assigns": or as the case may be.

of Y., and has agreed with the said P. for the sale to him of the said hereditaments for the sum of £1,000;

Witnesseth. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £1,000 now paid by the said P. to the said V. (the receipt whereof the said V. doth hereby acknowledge):

Covenant to surrender. HE, the said V. AS BENEFICIAL OWNER, doth hereby COVENANT with the said P., his heirs and assigns, that he the said V., or his heirs and all other necessary parties (if any), will forthwith, at the cost of the said P., his heirs or assigns, SURRENDER into the hands of the lord of the said Manor of X. according to the custom thereof,

ALL THAT [*parcels*],

To which said hereditaments the said V. was admitted at a Court holden for the said Manor on the —— day of ——, 18—, on the surrender of A. B.:

To use of purchaser. TO THE USE OF the said P., his heirs and assigns for ever, to be holden of the lord of the said manor according to the custom thereof, by and under the rents, fines, heriots, suits, and services due and of right accustomed for the same:

Declaration of trust until surrender. AND the said V. doth hereby declare that, in the meantime and until the said hereditaments and premises shall have been surrendered pursuant to the covenant hereinbefore contained, he the said V. and his heirs will stand seised thereof in trust for the said P., his heirs and assigns (*a*).

IN WITNESS, &c.

X.

SURRENDER *of* COPYHOLDS *to a Purchaser.*

Manor of X. in the County of Y. } The —— day of ——, 19—.

BE IT REMEMBERED that on the day above mentioned V. of, &c., a copyhold tenant of the said manor, came before

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(*a*) This declaration of trust is not absolutely necessary. *Re Cuming*, L. R. 5 Ch. 72.

me, J. S., steward of the said manor, and did out of Court and in consideration of the sum of £1,000 to the said V. paid by P., of, &c. (the receipt whereof the said V. doth hereby acknowledge), SURRENDER out of his hands into the hands of the lord of the said manor by the hands and acceptance of me the said steward by the rod according to the custom of the said manor, Surrender.

ALL THAT [*parcels*],

TO THE USE of the said P., his heirs and assigns for ever at the will of the lord according to the custom of the said manor by and under the rents, fines, heriots, suits, and services due and of right accustomed for the same.

V.
P.

Taken the day and year first above written by me. } J. S., Steward.

[Receipt for consideration.]

XI.

ADMITTANCE *of Purchaser to* COPYHOLDS.

Manor of X. in the County of Y. } The —— day of ——, 19—,

WHEREAS on the —— day of ——, 19—, V., of, &c. [*vendor*], one of the copyhold tenants of the said manor, came before me, J. S., steward [*or*, "deputy-steward"] of the said manor, and did out of Court surrender into the hands of the lord of the said manor, ALL THAT [*parcels*], to the use of P., of, &c. [*purchaser*], his heirs and assigns according to the custom of the said manor, by and under the rents, fines, heriots, suits, and services due and of right accustomed for the same; Recital of surrender.

NOW BE IT REMEMBERED that on the day first above mentioned, the said P. came before me, the said J. S., steward [*or*, "deputy-steward"] of the said manor, out of Memorandum of admittance.

Court, and prayed to be admitted tenant to the said hereditaments so surrendered to his use as aforesaid, of which said hereditaments the lord of the said manor by me, the said J. S., granted seisin by the rod,

To HOLD the same UNTO the said P. and his heirs at the will of the lord according to the custom of the said manor, by and under the rents, fines, heriots, suits, and services due and of right accustomed for the same;

AND SO, saving the right of the lord, the said P. is admitted tenant of the said hereditaments, and pays to the lord on such his admittance a fine certain of £——, and his fealty is respited.

XII.

LEASE *of a* COTTAGE *from* YEAR *to* YEAR.

AN AGREEMENT (*a*), made the —— day of ——, 19—,

Parties. BETWEEN A. B., of, &c. [*landlord*] (hereinafter called the lessor) of the one part, and C. D. of, &c. [*tenant*] (hereinafter called the lessee) of the other part.

Agreement to let and take. THE LESSOR hereby agrees to let and the lessee to take

Parcels. ALL THAT cottage situate in the parish of ——, in the county of ——, now in the occupation of ——, with the garden and appurtenances therewith usually occupied,

Term. For the term of ONE YEAR from the —— day of —— last, and so on from year to year until the demise shall be determined at the end of the first or any subsequent year, by either party giving to the other three calendar months' previous notice in writing,

Rent. AT THE YEARLY rent of ——, clear of all deductions, to be paid by equal quarterly payments on the four usual quarter days, the first such payment to be made on the —— day of ——, 19—.

(*a*) This Precedent, though in form an agreement, is in effect a demise. The term being less than three years, and the rent being not less than two-thirds of the full annual value, it is not required to be by deed; see Dav. Con. Prec. 392.

THE LESSEE further agrees with the lessor TO PAY the said rent on the days and in manner aforesaid; Agreements by lessee to pay rent;

To PAY all rates, taxes, and outgoings now payable, or hereafter to become payable in respect of the said premises; —to pay taxes;

To KEEP the said premises (including the fixtures) in good condition and [*tenantable*] repair (reasonable wear and tear excepted); —to keep in repair;

To PERMIT the lessor and his agents to enter twice or oftener in every year to view the condition of the said premises; —to permit lessor to enter and view;

AND AT the expiration or sooner determination of the demise, quietly to deliver up the said premises in such condition and repair as aforesaid. —to deliver up demised premises.

PROVIDED ALWAYS, that on breach of any of the lessee's agreements herein contained the lessor may re-enter on any part of the said premises in the name of the whole, and thereupon this demise shall determine. Proviso for re-entry.

THE LESSOR agrees with the lessee that he, paying the said yearly rent, and performing and observing the agreements by him herein contained, may peaceably hold the said premises during the demise without any interruption by the lessor or any person claiming under him. Agreement by lessor for quiet enjoyment.

IN WITNESS, &c.

XIII.

LEASE *of a* HOUSE *in a Town*.

THIS INDENTURE, made the —— day of ——, 19—.

BETWEEN A. B. of, &c. [*lessor*] (hereinafter called the lessor), of the one part, and C. D., of, &c. [*lessee*] (hereinafter called the lessee), of the other part; Parties.

WITNESSETH, that, in consideration of the rent hereinafter reserved, and the covenants by the lessee hereinafter contained, the lessor doth hereby DEMISE unto the lessee, Witnesseth. Demise.

ALL THAT dwelling-house, numbered —— in —— street, in the parish of ——, in the town of ——, with the yard, Parcels.

outbuildings, and ground held therewith, as the site thereof is delineated on the plan in the margin of these presents, and is thereon coloured ——;

Habendum. To HOLD the premises UNTO the lessee for the term of —— years from the —— day of ——, 19—;

Reddendum. YIELDING therefor, during the said term, the yearly rent of £——, clear of all deductions, by equal half-yearly payments on the —— day of —— and the —— day of —— in every year, the first of such payments to be made on the —— day of —— next.

Covenant by the lessee, to pay the rent; AND the lessee doth hereby for himself and his assigns covenant with the lessor, THAT he, the lessee, during the said term will pay the yearly rent hereinbefore reserved, on the days and in manner aforesaid;

—and rates, &c.; AND will pay all rates, taxes, and outgoings now payable or hereafter to become payable in respect of the said premises;

—and keep the premises insured; AND will keep the said premises insured against loss or damage by fire in such office as the lessor shall approve, and will, when required, produce the policy of such insurance, and the current year's receipt for the premium thereon, to the lessor;

—and in repair; AND will keep the said premises in good condition and complete repair, and without any alteration, except such as the lessor shall approve of;

—and yield up at the end of the term; AND, at the expiration or sooner determination of the said term, so yield up the same unto the lessor;

—and that landlord may enter to inspect. AND will permit the lessor and his agents, surveyors, and workmen, at all reasonable times during the said term, to enter upon the said premises to inspect the same;

Proviso for re-entry. PROVIDED ALWAYS that, if and whenever any part of the said rent shall be in arrear for twenty-one days, whether lawfully demanded or not, or there shall be a breach of any of the covenants by the lessee herein contained, the lessor may re-enter upon the said premises, and immediately thereupon the said term shall absolutely determine.

Covenant by the lessor for quiet enjoyment. AND THE lessor doth hereby covenant with the lessee, that the lessee performing and observing all the covenants by

the lessee herein contained, may quietly hold and enjoy the said premises during the said term, without any interruption by the lessor, or any person claiming through him.

PROVIDED ALWAYS, that unless such an interpretation is inconsistent with the context, the expression the lessor hereinbefore used shall include his heirs and assigns (*a*), and the expression the lessee hereinbefore used shall include his executors, administrators and assigns. Interpretation clause.

IN WITNESS, &c.

XIV.

UNDERLEASE.

THIS INDENTURE, made the —— day of ——, 19—,

BETWEEN A. of, &c. [*underlessor*] (hereinafter called the landlord), of the one part, and B., of, &c. [*underlessee*] (hereinafter called the tenant), of the other part. Parties.

WHEREAS, by an indenture of lease, dated the —— day of ——, and expressed to be made between [*parties*], Recital of lease;

ALL THAT [*parcels from the original lease*], with the appurtenances, were demised by the said [*original lessor*] to the landlord, his executors, administrators, and assigns, for the term of —— years from the —— day of ——, 19—, at the yearly rent of £——, and subject to covenants by the lessee, and conditions therein contained;

AND WHEREAS the landlord has agreed with the tenant for an underlease of the premises upon the terms hereinafter expressed; —agreement for underlease.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of £—— this day paid by the tenant to the landlord (the receipt whereof the landlord doth hereby acknowledge), HE the landlord doth hereby demise unto the tenant, Witnesseth. Consideration. Receipt. Demise.

(*a*) If the lessor himself holds for a term, substitute "executors, administrators or assigns."

Parcels. ALL the said hereditaments and premises comprised in and expressed to be demised by the hereinbefore recited indenture of lease,

Habendum. TO HOLD the said hereditaments and premises unto the tenant, for the term of —— years from the —— day of ——, 19— (*a*);

Reddendum. YIELDING therefor, during the said term hereby granted, the yearly rent of £—— clear of all deductions, by equal quarterly payments on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of —— in every year, the first such quarterly payment to be made on the —— day of ——, 19—.

Covenants by tenant; AND the tenant doth hereby for himself and his assigns covenant with the landlord THAT he the tenant, during the said term hereby granted, will pay unto the landlord

—to pay rent and taxes; [*remainder of covenants to pay the rent, rates, &c., supra*, p. 290];

—to perform covenants in original lease; AND will perform and observe all the covenants by the lessee, and conditions contained in the hereinbefore recited indenture of lease, and henceforth to be performed and observed, except the covenant for the payment of the said

—except the covenant for payment of rent; yearly rent of £—— by the same indenture reserved;

—to indemnify the landlord. AND WILL keep the landlord indemnified against all actions, expenses, claims, demands, and liability, on account of the breach of the said covenants and conditions (except as aforesaid), or any of them. [*Proviso for re-entry, supra*, p. 290].

Covenants by landlord for quiet enjoyment; AND the landlord doth hereby covenant with the tenant, that he the tenant [*remainder of covenant for quiet enjoyment, supra*, p. 290].

—to pay the original rent; AND FURTHER, that he, the landlord, will during the said term hereby granted, duly pay the said yearly rent of £—— reserved by the hereinbefore recited indenture of lease,

—and indemnify the lessee; AND WILL at all times keep the tenant, his estate and effects indemnified against all actions, expenses, claims, and demands, on account of the non-payment of the said rent, or any part thereof.

(*a*) This term must expire before that granted by the head lease.

AND the landlord doth hereby acknowledge the right of the tenant to production of the hereinbefore recited indenture of lease, and to delivery of copies thereof, and doth hereby undertake for the safe custody thereof. [*Interpretation clause, supra*, p. 291, *with the variation in note* (*a*) p. 291.] —and acknowledges right to production, &c., of lease.

IN WITNESS, &c.

XV.

ASSIGNMENT *of* LEASEHOLDS *on a Sale.*

THIS INDENTURE, made the —— day of ——, 19—.

BETWEEN J. V., of, &c. [*vendor*], of the one part, and T. P., of, &c. [*purchaser*], of the other part. Parties.

WHEREAS, by an indenture of lease, dated the —— day of ——, 19—, and expressed to be made between A. B of the one part and C. D. of the other part, ALL THAT, &c. [*parcels from the lease*] with the appurtenances, were demised to the said C. D., his executors, administrators, and assigns, for the term of twenty-one years from the —— day of ——, 19—, at the yearly rent of £100, and subject to covenants by the lessee and conditions therein contained (*a*); Recital of lease;

AND WHEREAS by virtue of divers mesne assurances, acts in the law and events, and ultimately by an indenture dated the —— day of ——, 19—, and expressed to be made between G. H. of the one part and the said J. V. of the other part, the premises comprised in the said indenture of lease have become absolutely vested in the said J. V. for all the residue of the said term of twenty-one years subject to the rent reserved by and the covenants and conditions contained in the said indenture of lease: —devolution of title to lease;

AND WHEREAS the said J. V. has agreed with the said T. P. for the sale to him, for the sum of £1,000 of the premises comprised in the said indenture of lease, for the residue of the term thereby granted subject as aforesaid. —of the contract for sale.

(*a*) In assigning leaseholds it is usual to recite the lease and to set out the parcels in the recital.

Witnesseth. Consideration. Receipt. Assignment.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £1,000 to the said J. V. this day paid by the said T. P. (the receipt whereof the said J. V. doth hereby acknowledge) HE the said J. V. as BENEFICIAL OWNER (*b*) doth hereby assign unto the said T. P.,

Parcels.

ALL the said hereditaments and premises demised by the said recited indenture of lease of the —— day of ——, 19—,

Habendum.

TO HOLD the same unto the said T. P., his executors, administrators, and assigns, henceforth for all the residue now unexpired of the said term of twenty-one years, subject to the payment of the rent and performance and observance of the covenants on the part of the lessee and conditions by and in the said indenture of lease reserved and contained, and henceforth to be paid, performed and observed.

Covenant by purchaser to pay rent and observe covenants,

AND THE SAID T. P. doth hereby, for himself, his executors, administrators and assigns, covenant with the said J. V., that he the said T. P., his executors, administrators, or assigns, will henceforth during the continuance of the said term pay the rent by the said lease reserved, and perform all the covenants by the lessee therein contained, and keep the said J. V., his heirs, executors, and administrators,

and indemnify vendor in respect thereof.

indemnified against all actions, expenses, claims, demands, and liability on account of the non-payment of the said rent, or the breach of the said covenants, or any of them.

IN WITNESS, &c.

XVI.

ASSIGNMENT *of* LEASEHOLDS *by* MORTGAGOR *and* MORTGAGEE *to a Purchaser, where the Mortgage was by* DEMISE. VARIATIONS *for Mortgage by* ASSIGNMENT.

Parties.

THIS INDENTURE, made the —— day of ——, 19—, BETWEEN A., of, &c. [*mortgagor*], of the first part, B.,

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(*b*) These words imply the covenants for title under Conv. Act, 1881, s. 7 (1) (*A*), and the further covenant for validity of the lease under Conv. Act, 1881, s. 7 (1) (*B*).

of, &c. [*mortgagee*], of the second part, and C., of, &c. [*purchaser*], of the third part;

Recitals; Lease.

WHEREAS by an indenture of lease, dated, &c. [*recite lease to A., as in Prec. XV.*, p. 293, *supra*]:

Mortgage;

AND WHEREAS by an indenture of mortgage (*a*), dated the —— day of ——, 19—, and expressed to be made between the said A. of the one part, and the said B. of the other part, the premises comprised in the said lease were demised (*a*) by the said A. to the said B., his executors, administrators, and assigns, for the residue of the term thereby granted except the last day thereof [*or*, "the last —— days thereof," *or as the case may be*] (*b*), by way of mortgage for securing the payment to the said B., his executors, administrators, or assigns, of the sum of £500 with interest thereon at the rate and on the day therein mentioned:

—contract for sale.

AND WHEREAS the said A. has agreed with the said C. for the sale to him for the sum of £900 of the premises comprised in the said lease for all the residue now to come of the said term thereby granted as aforesaid, subject to the rent reserved by, and the covenants and conditions contained in, the said lease:

State of mortgage debt.

AND WHEREAS the said sum of £500 still remains owing to the said B. on the security of the said indenture of mortgage, but all interest thereon has been paid up to the date of these presents:

Agreement for mortgagee's concurrence.

AND WHEREAS it has been agreed that the said sum of £500 shall be paid to the said B. out of the said purchase money, and that he shall concur in these presents in manner hereinafter appearing:

Witnesseth.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said recited agreement and in consideration of the sum of £900 now paid by the said C. at the request of the said A. in manner following, namely, the sum of £500 part thereof to the said B. in full discharge of the moneys owing to him under his said mortgage security as aforesaid (the receipt whereof the said B. doth hereby acknowledge), and the sum

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(*a*) See Precedent XXVII., p. 310, *infra*.

(*b*) Where the mortgage was by assignment, say "assigned" instead of "demised," and omit the words "except the last day thereof."

of £400 residue thereof to the said A. (the receipt and payment in manner aforesaid of which respective sums, making together the said purchase money of £900, the said A. doth hereby acknowledge), the said B., AS MORTGAGEE, by the direction of the said A., to the intent that the said term created by the said indenture of mortgage may merge in the said term created by the said indenture of lease, doth hereby ASSIGN, SURRENDER and RELEASE (*c*), and the said A. as BENEFICIAL OWNER doth hereby ASSIGN and CONFIRM unto the said C.

Parcels.

ALL AND SINGULAR the hereditaments and premises comprised in or expressed to be demised by the said indenture of lease;

TO HOLD the same UNTO the said C., his executors, administrators, and assigns, henceforth for all the residue now unexpired of the said term of —— years granted by the said indenture of lease, subject henceforth to the payment of the rent and performance and observance of the covenants on the part of the lessee and conditions by and in the same indenture reserved and contained, but discharged from all principal moneys and interest intended to be secured by, and from all claims and demands under the said indenture of mortgage:

Covenant by purchaser to pay rent and observe covenants.

AND the said C. doth hereby for himself, his executors, administrators, and assigns, covenant with the said A., &c. [*as in Prec. XV.*, p. 294, *supra*].

IN WITNESS, &c.

XVII.

ASSIGNMENT *of* LEASEHOLDS *by a* MORTGAGEE *under a* POWER OF SALE, *where the Mortgage was by* DEMISE. VARIATIONS *for Mortgage by* ASSIGNMENT.

THIS INDENTURE, made the —— day of ——, 19—,

(*c*) If the mortgage was by assignment of the lease, instead of the clause "the said B. . . . and release," say "the said B., AS MORTGAGEE, by the direction of the said A., doth hereby ASSIGN and RELEASE," &c.

BETWEEN B., of, &c. [*mortgagee*], of the one part, and C., of, &c. [*purchaser*], of the other part; Parties.

WHEREAS [*recite lease to A, as in Prec. XV.*, p. 293]: Recitals: Lease.

AND WHEREAS [*recite Mortgage to B. as in last Precedent*], and it was by the same indenture provided that [*set out fully the following clauses of the express power of sale if there be such in the mortgage, viz.: the authority to sell and convey, the declaration (where the mortgage was by demise) that the nominal reversion of the leaseholds should be held in trust for the purchaser, the clause protecting purchasers from irregularities in the sale, and the receipt clause*]; Mortgage;

AND WHEREAS the said B. has agreed with the said C. for the sale to him for the sum of £900 of the premises comprised in the said lease for all the residue now to come of the said term thereby granted, and for all such estate and interest in the nominal reversion of —— days thereby reserved as the said B. is entitled to or has power to assign (*a*): —contract for sale.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the sum of £900, now paid by the said C. to the said B. (the receipt whereof the said B. doth hereby acknowledge), the said B. AS MORTGAGEE, in exercise of the power vested in him by virtue of the hereinbefore recited indenture of mortgage [*or*, "The Conveyancing and Law of Property Act, 1881,"] and of every other power enabling him in this behalf, doth hereby ASSIGN unto the said C. ALL AND SINGULAR the hereditaments and premises comprised in and demised by the hereinbefore recited indenture of lease; Witnesseth.

TO HOLD the same UNTO the said C., his executors, administrators, and assigns, for all the residue now unexpired of the said term of —— years less —— days, and for all such estate and interest in the same nominal reversion of —— days as the said B. is entitled to or has power to assign (*a*) [*free from equity of redemption, but subject to rent and covenants of lease, as in last Precedent*];

(*a*) If the mortgage was by assignment, the reference to the nominal reversion will be omitted.

[*If the mortgage was by assignment, and B. will be under any continuing liability add, covenant by C. with B., his executors and administrators, for indemnity against rent and covenants of the lease, as in Precedent XV.*, p. 294, *supra*].

In witness, &c.

XVIII.

Surrender *of* Freeholds *by* Tenant for Life *to* *Remainderman in Fee.*

THIS INDENTURE, made the —— day of ——, 19—,

Parties. Between T. L., of, &c. [*tenant for life*], of the one part, and F. R., of, &c. [*remainderman*], of the other part;

Recital of title for life, with remainder in fee. Whereas under an indenture, dated, &c., and made between [*parties*], the said T. L. is seised as tenant for life in possession without impeachment of waste of the hereditaments hereby assured, with remainder to the said F. R. in fee-simple.

—of contract for sale. And whereas the said T. L. has agreed with the said F. R. for the sale and surrender to the said F. R. of the life estate of the said T. L. in the hereditaments hereby assured for the sum of £1,000;

Witnesseth. Now this Indenture witnesseth that, in pursuance of the said agreement, and in consideration of the sum of £1,000, now paid by the said F. R. to the said T. L. (the receipt whereof the said T. L. doth hereby acknowledge), He the said T. L. as Beneficial Owner, doth hereby grant and surrender unto the said F. R.,

All that [*parcels*],

Habendum. To hold the same unto and to the use of the said F. R., his heirs and assigns, for and during the life of the said T. L., to the intent that the estate for life of the said T. L. in the said premises may merge, and be extinguished in the reversion and inheritance thereof, and that the said F. R. may become seised of, or entitled to the same premises for an estate of inheritance in fee-simple in possession.

In witness, &c.

XIX.

RELEASE *of Remainder of Fee in* FREEHOLDS *to Tenant for Life.*

THIS INDENTURE, made the —— day of ——, 19—,

BETWEEN F. R., of, &c. [*remainderman*], of the one part, and T. L., of, &c. [*tenant for life*], of the other part; Parties.

WHEREAS under an indenture, dated the —— day of ——, 19—, and made between [*parties*], the hereditaments hereby assured now stand limited to the use of the said T. L. for his life with remainder to the use of the said F. R. in fee-simple; Recital of title;

AND WHEREAS the said F. R. has agreed with the said T. L. for the sale to the said T. L. for the sum of £10,000 of the remainder and inheritance in fee-simple of the said F. R. expectant on the decease of the said T. L. of and in the said hereditaments, and it has been further agreed that the succession duty payable in respect of the said premises upon the decease of the said T. L. shall be paid by the said T. L., and that he shall enter into the covenant in relation thereto hereinafter contained; —contract for sale; —as to succession duty.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement for sale, and in consideration of £10,000, now paid by the said T. L. to the said F. R. (the receipt, &c.), HE the said F. R. AS BENEFICIAL OWNER, doth hereby GRANT AND RELEASE unto the said T. L. Witnesseth.

ALL THAT [*parcels*],

TO HOLD the same premises UNTO AND TO THE USE OF the said T. L., his heirs and assigns, subject to the estate for life of the said T. L. in the said premises, to the intent that the same estate for life may merge and be extinguished in the remainder and inheritance thereof, and that the said T. L. may be henceforth seised of or entitled to the fee-simple and inheritance in possession thereof; Habendum.

AND the said T. L. doth hereby covenant with the said F. R., his heirs, executors, administrators, and assigns, that he, the said T. L., his heirs, executors, or administrators, will when and as soon as any succession duty shall become payable in respect of the premises hereby assured upon the Covenant by purchaser to pay succession duty.

death of the said T. L. pay and discharge the same, and will at all times keep the said F. R., his heirs, executors, administrators, and assigns effectually indemnified against the same and every part thereof, and all actions, proceedings, costs, charges, claims, and demands whatsoever in respect thereof.

IN WITNESS, &c.

XX.

CONVEYANCE *of* REVERSION *in fee in* FREEHOLDS *to a Purchaser.*

THIS INDENTURE, made the —— day of ——, 19—,

Parties. BETWEEN F. R., of, &c. [*vendor*] of the one part, and J. P., of, &c. [*purchaser*], of the other part;

Recital of title to reversion; WHEREAS under an indenture, dated, &c., and made between [*parties*] the said F. R. is seised of the hereditaments hereby assured in fee-simple in reversion expectant on the decease of A. B., of, &c., free from incumbrances;

—contract for sale. AND WHEREAS [*recite contract for sale of reversion and inheritance in fee-simple expectant on the decease of the said A. B., and agreement that J. P. shall pay succession duty, as in last Precedent, mutatis mutandis*];

Witnesseth. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration, &c. (the receipt, &c.) HE, the said F. R., AS BENEFICIAL OWNER, doth hereby GRANT unto the said J. P.,

ALL THAT [*parcels*],

Habendum. TO HOLD the same premises UNTO AND TO THE USE of the said J. P. in fee-simple (*a*), subject to the estate for life of the said A. B. in the same premises;

Covenant to pay succession duty. AND [*covenant by J. P. to pay succession duty: see last Precedent*].

IN WITNESS, &c.

(*a*) As to the use of these words of limitation, see Conv. Act, 1881, s. 51.

XXI.

Partition Deed.

THIS INDENTURE, made the —— day of ——, 19—,

Between A., of, &c., of the first part, B., of, &c., of the second part, and C., of, &c., of the third part; Parties.

Whereas the said A. and B. are seised of or entitled to the lands and hereditaments mentioned in the first and second schedules hereto as joint tenants (*a*) in fee-simple; Recital of title;

And whereas the said A. and B. are desirous of making a partition of the said lands and hereditaments, and have agreed that the hereditaments comprised in the first schedule hereto shall be taken by and appropriated to the said A. in severalty in lieu of his undivided share of the entirety of the said lands and hereditaments mentioned in the said first and second schedules, and that the hereditaments contained in the second schedule hereto shall be taken by and appropriated to the said B. in severalty in lieu of his undivided share of such entirety as aforesaid; and further, that the sum of £150 shall be paid by the said A. to the said B. for equality of partition; —agreement for partition;

And whereas the said sum of £150 has been paid by the said A. to the said B. before the execution of these presents, as the said B. doth hereby acknowledge; —payment for equality of partition;

And whereas the said A. and B. are desirous that the hereditaments so to be allotted to them respectively shall be conveyed and assured in manner hereinafter appearing; — as to conveyances.

Now this Indenture witnesseth that, for effectuating the said partition, and in consideration of the premises, the said A. and B. jointly, as Beneficial Owners, do (*b*) hereby grant unto the said C., Witnesseth. Grant.

(*a*) Or (as the case may be, for example)—"as tenants in common in equal shares"; or—"as tenants in common in the shares and proportions following, namely, the said A. is entitled to one equal third share thereof and the said B. to the remaining two third shares thereof."

(*b*) If A. and B. are tenants in common or co-parceners say—

"each of them conveying as Beneficial Owner of the respective share or shares, estate and interest in the heredita-

ALL THOSE the lands, hereditaments, and premises, mentioned in the first and second schedules hereto,

TO HOLD the same UNTO the said C. and his heirs TO THE USES following (that is to say),

As to entirety of part.

AS TO the entirety of the said lands, hereditaments, and premises comprised in the first schedule hereto, TO THE USE OF the said A., his heirs and assigns for ever, to be henceforth held by him and them in severalty;

As to entirety of other part.

AND AS TO the entirety of the said lands, hereditaments, and premises comprised in the second schedule hereto, TO THE USE OF the said B., his heirs and assigns for ever, to be henceforth held by him and them in severalty.

IN WITNESS, &c. (*c*),

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

XXII.

EXCHANGE.

THIS INDENTURE, made, &c.

Parties.

BETWEEN A. B., of &c., of the one part, and C. D., of, &c., of the other part;

Recitals of estates in the property.

WHEREAS the said A. B. is seised of the hereditaments comprised in the first schedule hereto in fee-simple in

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ments hereby assured to which he is entitled as hereinbefore appears, and all other (if any) his share, estate, or interest therein, do and each of them doth."

(*c*) If A. and B. are joint tenants, it will be proper to add a proviso restricting their liability under the covenants for title implied under the Conv. Act, 1881, s. 7, by virtue of their conveying "as Beneficial Owners"; for the form of such a proviso, see Davidson, Concise Precedents (19th ed.), p. 141, note.

Some documents relating to the common title will usually be retained by one of the parties and he will give to the other an acknowledgment and undertaking (see above, p. 277), in respect of such documents. Each party will also, as to documents relating to his own undivided share, give an acknowledgment and undertaking to the other.

The deed of partition will be executed in duplicate.

possession, free from incumbrances; and the said C. D. is seised of the hereditaments comprised in the second schedule hereto in fee-simple in possession, free from incumbrances.

And whereas the said A. B. and C. D. have agreed to make an exchange in manner hereinafter appearing of the said hereditaments comprised in the said first and second schedules hereto respectively; —of agreement for exchange.

Now this Indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the conveyance hereinafter contained by the said C. D., He the said A. B. as Beneficial Owner, doth hereby grant unto the said C. D., Witnesseth. Conveyance by one party.

All those the messuage, lands, and hereditaments, situate in the parish of X., in the county of Y., specified in the said first schedule hereto and delineated in the map in the margin of these presents, and therein coloured ——, Parcels.

To hold the said premises unto and to the use of the said C. D. and his heirs, in exchange for the said hereditaments, hereinafter conveyed in exchange by the said C. D. Habendum.

And this Indenture also witnesseth, that, in further pursuance of the said agreement, and in consideration of the conveyance by the said A. B. hereinbefore contained, He, the said C. D. as Beneficial Owner, doth hereby grant unto the said A. B. Witnesseth, secondly. Conveyance by the other party.

All those the messuage, lands, and hereditaments situate in the parish of X. aforesaid, specified in the said second schedule hereto, and delineated in the map in the margin of these presents, and therein coloured ——, Parcels.

To hold the said premises unto and to the use of the said A. B., his heirs and assigns, in exchange for the said hereditaments, hereinbefore conveyed in exchange by the said A. B. Habendum.

In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

XXIII.

Conveyance *of an* Equity of Redemption.

THIS INDENTURE, made the —— day of ——, 19—,

Parties. Between V. of, &c. [*vendor*], of the one part, and P. of, &c. [*purchaser*], of the other part;

Recital of mortgage (particular form). Whereas by an indenture of mortgage dated the —— day of ——, 19—, and expressed to be made between the said V. of the one part and M. of the other part, in consideration of the sum of £250 paid by the said M. to the said V., the said V. covenanted with the said M. for payment to the said M., his executors, administrators, or assigns, of the principal sum of £250 with interest for the same at the rate therein mentioned on the —— day of ——, 19—, then next, and in case of default in payment of the said principal sum on the day aforesaid, for payment to the said M. his executors, administrators, or assigns, thereafter of interest on the said principal sum half-yearly as therein mentioned. And by the same indenture the hereditaments hereinafter assured were conveyed by the said V., unto and to the use of the said M., his heirs and assigns, subject to a proviso for the redemption thereof upon payment to the said M., his executors, administrators, or assigns, of the sum of £250 with interest for the same as aforesaid;

State of mortgage debt. And whereas there is now owing to the said M. on the security of the said indenture of mortgage the principal sum of £250, with the sum of £5 for interest thereon, making together the sum of £255;

Contract for sale. And whereas the said P. has contracted with the said V. for the absolute purchase of the hereditaments hereinafter assured and the inheritance thereof in fee-simple subject to the hereinbefore recited indenture of mortgage, and the said principal sum of £250 and the interest now due and hereafter to accrue due thereon, which are to be borne and paid by the said P., for the sum of £300, making with the said principal sum of £250 and the said sum of £5 now due for interest the sum of £555;

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration of the sum of £300 now paid by the said P. to the said V. (the receipt whereof the said V. doth hereby acknowledge), and in consideration also of the covenant on the part of the said P. hereinafter contained, the said V. as BENEFICIAL OWNER doth hereby GRANT unto the said P., his heirs and assigns, Witnesseth. Grant.

ALL THOSE [*parcels*],

TO HAVE AND TO HOLD the same UNTO AND TO THE USE OF the said P., his heirs and assigns, SUBJECT to the hereinbefore recited indenture of mortgage, and to the payment of the said principal sum of £250 now owing as aforesaid upon the security of the said indenture of mortgage and the interest now due and henceforth to accrue due in respect thereof; Habendum, subject to mortgage.

AND the said P. doth hereby covenant with the said V., his executors and administrators, that he the said P., his heirs, executors, administrators, or assigns, will pay to the said M., his executors, administrators, or assigns, on such payment being lawfully demanded, the said principal sum of £250 so owing on the security of the said recited indenture of mortgage as aforesaid, and the interest now due and henceforth to accrue due in respect thereof, and will at all times keep the said V., his heirs, executors, and administrators effectually indemnified against the same, and every part thereof, and all actions, proceedings, costs, charges, claims, and demands whatsoever in respect thereof. Covenant by purchaser to indemnify vendor against mortgage debt.

PROVIDED ALWAYS that, if the said V., his heirs, executors, or administrators, shall be called upon to pay and shall pay the said principal sum of £250 and interest or any part thereof respectively, the money so paid by him or them with interest thereon at the rate of £5 per cent. per annum from the time of payment thereof shall be and the same is hereby made a charge upon the said hereditaments and premises hereby assured for the benefit of the said V., his heirs, executors, and administrators.

IN WITNESS, &c.

XXIV.

Mortgage *in fee of* Freeholds.

THIS INDENTURE, made the 1st day of July, 1920,

Between A. of, &c. (hereinafter called the mortgagor), of the one part, and M. of, &c. (hereinafter called the mortgagee) of the other part;

Recital of seisin of mortgagor

Whereas the mortgagor is seised of the hereditaments hereby mortgaged for an estate in fee-simple in possession free from encumbrances;

—of agreement for mortgage.

And Whereas the mortgagee has agreed with the mortgagor to lend him the sum of £1,000 upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing:

Witnesseth. Consideration.

Now this Indenture witnesseth that, in pursuance of the said agreement and in consideration of the sum of £1,000 now paid by the mortgagee to the mortgagor (the receipt whereof the mortgagor doth hereby acknowledge),

Covenant for payment of principal and interest;

the mortgagor hereby covenants with the mortgagee to pay to him on the 1st day of January next (*a*) the sum of £1,000 with interest thereon in the meantime at the rate of £6 per cent. per annum, computed from the date hereof;

—of interest after default.

And also so long as any principal money shall remain unpaid after the said 1st day of January next (whether the same shall be due under this covenant or under any judgment or otherwise) (*b*) to pay to him interest thereon at the rate aforesaid, by equal half-yearly (*c*) payments on the 1st day of July and the 1st day of January in every year;

Witnesseth, secondly.

And this Indenture also witnesseth that, in further pursuance of the said agreement, and for the consideration aforesaid, the mortgagor as beneficial owner (*d*), doth hereby grant unto the mortgagee,

Grant of lands.

All that [*parcels*]

(*a*) The day fixed is generally six months from the date of the mortgage.

(*b*) Where the rate of interest reserved is higher than 4 per cent. it is desirable to add these words. See *Ex parte Fewings*, 25 Ch. D. 338.

(*c*) Sometimes the interest is made payable quarterly.

(*d*) These words imply absolute covenants for title by virtue of Conv. Act, 1881, s. 7 (1) (*C*).

TO HAVE AND TO HOLD the same UNTO and TO THE USE OF the mortgagee, his heirs and assigns, SUBJECT to the proviso for redemption hereinafter contained (that is to say): Habendum.

PROVIDED ALWAYS, and it is hereby agreed and declared that, on payment on the said 1st day of January next by the mortgagor or the persons deriving title under him, to the mortgagee or the persons deriving title under him, of the sum of £1,000, with interest thereon in the meantime at the rate aforesaid, the premises hereinbefore granted shall, at the request and at the cost of the mortgagor or the persons deriving title under him, be duly reconveyed to him or them; Proviso for redemption.

IN WITNESS, &c.

XXV.

MORTGAGE *of* COPYHOLDS.

THIS INDENTURE, made the 1st day of July, 1919,

BETWEEN J. B., of, &c. [*mortgagor*], of the one part, and W. L. of, &c. [*mortgagee*], of the other part:

WHEREAS at a Court holden for the manor of X. in the county of Y., on the 24th day of June, 1919, the said J. B. was admitted to the hereditaments hereby mortgaged, to hold at the will of the lord according to the custom of the said manor; Recital of admittance of mortgagor.

AND WHEREAS the said W. L. has, at the request of the said J. B., agreed to lend him the sum of £1,000 upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing; —of agreement for loan.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration, &c. [*as above*, p. 306, *receipt and covenant by J. B. to pay principal and interest, and interest after default*]; Witnesseth. —covenant to pay, &c.

AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said recited agreement and for the consideration aforesaid, the said J. B. as BENEFICIAL Witnesseth, secondly: —covenant to surrender;

Owner (*a*) doth hereby covenant with the said W. L., his executors, administrators, and assigns, that he the said J. B. or his heirs and all other necessary parties (if any) will forthwith, at his or their own cost, surrender into the hands of the lord or lords of the said manor according to the custom thereof;

All that [*parcels*],

To the use of the said W. L., his heirs and assigns, to be holden of the lord of the said manor by copy of Court Roll according to the custom thereof, by and under the rents, fines, suits, and services, due and of right accustomed for the same, subject to a condition for making void the surrender to be made in pursuance of this covenant if the said J. B., his heirs, executors, administrators, or assigns, shall, on the said 1st day of January next, pay to the said W. L., his executors, administrators, or assigns, the sum of £1,000, with interest for the same in the meantime at the rate aforesaid;

—subject to condition.

Declaration of trust until surrender.

And (*b*) the said J. B. doth hereby declare that, until such surrender shall be made, he the said J. B., his heirs and assigns, shall stand seised of the said premises hereinbefore covenanted to be surrendered in trust for the said W. L., his heirs and assigns, subject to such equity of redemption as the same premises would have been subject to if such surrender had been made;

Power of attorney.

And doth hereby irrevocably appoint the said W. L., his executors, administrators, and assigns, and every of them the attorney and attorneys of him the said J. B., in his name and on his behalf, at any time to surrender the said premises pursuant to the covenant hereinbefore contained, and to execute and do all instruments and acts necessary or proper for that purpose.

In witness, &c.

(*a*) By Conv. Act, 1881, s. 2 (v.), "conveyance" includes covenant to surrender, and these words will imply the mortgagor's covenants for title under section 7 (1) (*C*).

(*b*) This clause and the next clause will be found only in modern deeds.

XXVI.

CONDITIONAL SURRENDER *of* COPYHOLDS *on a* MORTGAGE.

Manor of X., in the County of Y. } BE IT REMEMBERED that on the 2nd day of July, 1920, J. B., of, &c. [*mortgagor*], a customary tenant of the said manor, came before ——, gentleman, steward of the said manor, and in consideration of £1,000 to him the said J. B. this day paid by W. L. of, &c. [*mortgagee*], and in pursuance of a covenant contained in an indenture dated the 1st day of July, 1920, and expressed to be made between the said J. B. of the one part and the said W. L. of the other part, did out of Court SURRENDER by the rod into the hands of the lord of the said manor, by the hands and acceptance of the said steward,

ALL THAT [*parcels, as in the mortgage deed*], Together with all buildings, fixtures, rights, easements, advantages, and appurtenances whatsoever to the said hereditaments appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto,

TO THE USE of the said W. L., his heirs and assigns, for ever, TO BE HOLDEN at the will of the lord, and by and under the rents, fines, suits and services therefore due, and of right accustomed. SUBJECT to this condition, that if the said J. B., his heirs, executors, administrators, or assigns, shall pay unto the said W. L., his executors, administrators, or assigns, the sum of £1,000, with interest for the same in the meantime at the rate of £6 per cent. per annum, on the 1st day of January next, then this surrender is to be void.

XXVII.

Mortgage *of* Leaseholds *by* Demise (*a*): Variations *for a Mortgage by* Assignment.

THIS INDENTURE, made the —— day of ——, 19—,

Parties. Between A. of, &c. [*mortgagor*], of the one part, and B. of, &c. [*mortgagee*], of the other part:

Recital of lease; Whereas, &c. [*recite the lease, and its having become vested in the mortgagor, ut supra*, p. 293];

—of agreement for mortgage. And whereas the said B. has agreed to lend to the said A. the sum of £500, upon having the repayment thereof with interest as hereinafter mentioned secured in manner hereinafter appearing;

Witnesseth. Now this Indenture witnesseth that, in pursuance of the said agreement and in consideration of £500 to the said A. this day paid by the said B. (the receipt whereof the said A. doth hereby acknowledge), he the said A. doth hereby covenant [*for payment of principal and interest, as above*, p. 306]:

And this Indenture also witnesseth that, in further pursuance of the said recited agreement, and for the consideration aforesaid, the said A. as Beneficial Owner (*b*)

Demise. doth hereby demise (*c*) unto the said B.,

Parcels. All those the said hereditaments and premises by the said indenture of lease of the —— day of ——, expressed to be demised,

Habendum. To hold the said premises unto the said B., his executors, administrators, and assigns, for the residue now unexpired of the said term of —— years, except the last day thereof (*d*):

Proviso for redemption. Provided always, that if the said A., his heirs, executors, administrators, or assigns, shall pay to the said B., his

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(*a*) See, as to the form of a mortgage of leaseholds, Elph. Introd. 233.

(*b*) The covenants implied by virtue of these words, see Conv. Act, 1881, s. 7 (1), (*C*) and (*D*), include a covenant by the mortgagor to pay the rent reserved by the lease and perform the lessee's covenants.

(*c*) If the mortgage is by assignment, say "assign."

(*d*) In a mortgage by assignment omit the words "except the last day thereof."

executors, administrators, or assigns, on the —— day of —— next, the sum of £500 with interest for the same in the meantime at the rate of £6 per cent. per annum, then the said B., his executors, administrators, or assigns, will at any time thereafter, upon the request and at the cost of the said A., his executors, administrators, or assigns, surrender (*e*) the said premises unto the said A., his executors, administrators, or assigns, or as he or they shall direct:

Trust of last day of term.

AND IT IS HEREBY AGREED (*f*) that the said A., his executors, administrators, and assigns, shall henceforth stand possessed of the said last day of the said term of —— years in the said premises, in trust for the said B., his executors, administrators, and assigns, and to be disposed of as he or they shall direct, but subject to the same equity of redemption as may for the time being be subsisting in the said premises by virtue of these presents;

Appointment of attorney to assign nominal reversion.

AND the said A. doth hereby irrevocably appoint the said B., his executors, administrators, and assigns to be the attorney and attorneys of the said A. in his name and on his behalf and as his act and deed to sign, seal, deliver, and otherwise perfect every or any deed of assignment of the said term of —— years which may be desired by the said B., his executors, administrators, or assigns, in order to vest in him or them, or in any person or persons in trust for him or them subject as aforesaid, or in any purchaser of the said premises or any part thereof, the whole residue of the same term.

IN WITNESS, &c.

(*e*) In a mortgage by assignment say "re-assign" instead of "surrender."

(*f*) This clause and the next will be omitted in a mortgage by assignment.

XXVIII.

TRANSFER *of a* MORTGAGE *of* FREEHOLDS, *the* MORTGAGOR NOT *being a* PARTY.

THIS INDENTURE, made the —— day of ——, 19—,

Parties.

BETWEEN M. of, &c. [*mortgagee*], of the one part, and T. of, &c. [*transferee*], of the other part:

Recital of mortgage;

WHEREAS, &c. [*recital of the mortgage, ut supra*, p. 304];

—that principal and certain interest is now owing;

AND WHEREAS the said sum of £250, with £10 for interest thereon from the —— day of —— last, is now owing to the said M. on the said security;

—of agreement for transfer.

AND WHEREAS the said T. has agreed to pay to the said M. the said sums of £250 and £10, making together the sum of £260, upon having such transfer of the said mortgage debt and of the securities for the same as is hereinafter contained:

Witnesseth.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of £260 now paid to the said M. by the said T. (the receipt whereof the said M. doth hereby acknowledge), he the said M. AS MORTGAGEE (*a*), doth hereby assign unto the said T.,

—consideration;

—receipt;

—assignment of debt.

ALL THAT the said sum of £250 now owing to the said M. on the security aforesaid, and all interest due and to accrue due for the same, AND the full benefit of and right to enforce and exercise all covenants, powers, and remedies in the hereinbefore recited indenture contained or by statute implied, or thereby given or created for recovering and compelling payment of the said principal sum and interest, and the full benefit also of all other securities for the same,

Habendum.

TO HOLD the same unto the said T., his executors, administrators, and assigns absolutely:

Witnesseth, secondly:

AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said M. AS MORTGAGEE doth hereby grant unto the said T.,

—conveyance.

(*a*) These words imply a covenant against incumbrances on the part of the mortgagee; see Conv. Act, 1881, s. 7 (1) (*F*).

ALL THE said hereditaments and premises by the hereinbefore recited indenture of mortgage expressed to be granted, —parcels.

TO HOLD the same UNTO and TO THE USE of the said T., his heirs and assigns, SUBJECT to the equity of redemption subsisting therein under the hereinbefore recited indenture of mortgage. Habendum.

IN WITNESS, &c. (*b*).

XXIX.

TRANSFER *of a* MORTGAGE *of* LEASEHOLDS *by* INDORSEMENT *on the Mortgage deed where the* MORTGAGOR *is a* PARTY, *and has* NOT INCUMBERED *the equity of redemption* (*a*).

THIS INDENTURE, made the —— day of ——, 19—, BETWEEN the within-named B. [*mortgagee*], of the first part, the within-named A. [*mortgagor*], of the second part, and A. T. of, &c., and B. T. of, &c. [*transferees*], of the third part: Parties.

WHEREAS all interest for the within-mentioned sum of £500 has been paid up to the date of these presents, and the sum of £200 has been paid by the said A. to the said B. in part discharge of the said sum of £500, so that £300 only remains owing to the said B. on the security of the within-written indenture; Recital that all interest and part of the principal has been paid.

AND WHEREAS the said A. T. and B. T. have, at the request of the said A. agreed to pay to the said B. the sum of £300, upon having such transfer as is hereinafter contained of the said mortgage debt of £300 remaining owing on the security of the within-written indenture, and the securities for the same. Of agreement for transfer.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of £300, at the request of the said A., this day paid to the said B. by the said A. T. and B. T. out of moneys belonging to them on Witnesseth —consideration.

(*b*) Notice of this transfer should be given to the mortgagor.

(*a*) The mortgage to the transfer of which this Precedent relates is that given in Precedent XXVII., *supra*, p. 310.

a joint account (the receipt whereof the said B. doth hereby acknowledge), HE the said B. AS MORTGAGEE doth hereby assign unto the said A. T. and B. T.,

—assignment of mortgage debt.

ALL THAT the said principal sum of £300 now remaining owing to the said B. on the security of the within-written indenture as aforesaid, and the interest henceforth to grow due for the same, and the benefit of the power of sale and all other powers, remedies, and securities contained in or given by the within-written indenture for securing or recovering the said principal sum and interest,

TO HOLD the same unto the said A. T. and B. T., their executors, administrators, and assigns, absolutely:

Witnesseth, secondly:

—covenant for payment.

AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said A. doth hereby COVENANT with the said A. T. and B. T., their executors, administrators, and assigns, that he the said A., his heirs, executors, or administrators, will on the —— day of —— next (*b*) pay to the said A. T. and B. T., their executors, administrators, or assigns, the sum of £300 with interest for the same in the meantime at the rate of £—— per cent. per annum from the date of these presents:

AND WILL thereafter [*covenant to pay interest, as above*, p. 306]:

Witnesseth, thirdly:

—assignment of leasehold parcels.

AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, HE the said B. AS MORTGAGEE, and at the request of the said A., doth hereby assign, and he the said A. AS BENEFICIAL OWNER, doth hereby demise and confirm unto the said A. T. and B. T.,

ALL the hereditaments and premises by the within-written indenture expressed to be demised,

Habendum.

TO HOLD the said premises unto the said A. T. and B. T., their executors, administrators, and assigns, henceforth for the residue now to come of the within-mentioned term of —— years, except the last day thereof, DISCHARGED from all right or equity of redemption under the within-written

(*b*) This will usually be the next day for payment of interest.

indenture, but subject to the proviso for redemption hereinafter contained, that is to say,

PROVIDED ALWAYS [*Proviso for redemption, as above*, p. 310, *on payment by A. his heirs, executors, administrators, or assigns, to A. T. and B. T., or the survivor of them or the executors or administrators of such survivor, their or his assigns, of the said sum of* £300 *and the interest henceforth to become due for the same; Declaration of trust of last day and power of attorney, as above*, p. 311].

IN WITNESS, &c.

XXX.

TRANSFER *of* MORTGAGE *of* FREEHOLDS *where the* MORTGAGOR *is a* PARTY *and has* INCUMBERED *the equity of redemption.*

THIS INDENTURE, made the —— day of ——, 19—,

BETWEEN B. of, &c. [*mortgagee*], of the first part, A. of, &c. [*mortgagor*], of the second part, and T. of, &c. [*transferee*], of the third part:

WHEREAS by an indenture of mortgage, dated the —— day of ——, 19—, and expressed to be made between the said A. of the one part, and the said B. of the other part, the said A. granted the several messuages, farms, lands, tenements and hereditaments, known as the X. estate, situate in the parish of N., in the county of Y., and containing by estimation 560 acres (more or less), all which said premises were more particularly described in the schedule to the said indenture of mortgage annexed, unto and to the use of the said B., his heirs and assigns, subject to a proviso for redemption on payment by the said A., his heirs, executors, administrators, or assigns, to the said B., his executors, administrators or assigns of the sum of £6,000, with interest at the rate of £6 per cent. per annum on the day therein mentioned; Recital (particular of mortgage);

AND WHEREAS the said sum of £6,000 is owing to the said B. on the security of the said indenture of mortgage, but all —of state of mortgage debt;

interest for the same has been paid down to the date of these presents;

—of agreement for transfer.

AND WHEREAS the said T. has, at the request of the said A., agreed to pay to the said B. the sum of £6,000 upon having such transfer as is hereinafter contained of the said mortgage debt of £6,000 and interest, and the securities for the same, and upon having the repayment of the same with interest after the rate hereinafter mentioned further secured in manner hereinafter appearing:

Witnesseth:

—assignment of mortgage debt.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £6,000 to the said B. this day paid by the said T. at the request of the said A. (the receipt whereof the said B. doth hereby acknowledge), he the said B. AS MORTGAGEE doth hereby ASSIGN unto the said T.,

ALL THAT the said principal sum of £6,000 so owing to the said B. on the security of the said indenture of mortgage, and the interest henceforth to become due for the same, and the full benefit of the power of sale in the said indenture of mortgage contained [*or*, "by statute implied"] and of all other powers, remedies, and securities for recovering and compelling payment of or otherwise securing the same,

Habendum.

TO HOLD the same UNTO the said T., his executors, administrators, and assigns absolutely:

Witnesseth, secondly: covenant for payment.

AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid [*covenant by A. with T. for payment of principal and interest, as above*, p. 306]:

Witnesseth, thirdly.

AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, HE the said B. AS MORTGAGEE at the request of the said A. (*a*) do hereby GRANT unto the said T.,

Grant.

ALL AND SINGULAR the messuages, farms, lands, tenements, and hereditaments in the said indenture of mortgage comprised or expressed to be thereby granted or which are

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(*a*) As the mortgagor has incumbered the equity of redemption he does not join in the grant; compare the form above, p. 314, where the mortgagor has not incumbered the equity of redemption.

now by any means vested in the said B. subject to redemption by virtue of the same indenture.

To HOLD the same last-mentioned premises UNTO AND TO THE USE OF the said T., his heirs and assigns, SUBJECT to such right or equity of redemption as the same premises are now subject to by virtue of the said indenture of mortgage on payment to the said T., his executors, administrators, or assigns, of the said sum of £6,000 and the interest henceforth to become due for the same. Habendum.

IN WITNESS, &c.

XXXI.

TRANSFER *of a* MORTGAGE *of* COPYHOLDS, *where the* MORTGAGOR *is* NOT *a* PARTY (*a*).

THIS INDENTURE, made the —— day of ——, 19—, BETWEEN W. L., of, &c. [*mortgagee*], of the one part and F. T., of, &c. [*transferee*], of the other part:

WHEREAS by an indenture of mortgage dated the 1st day of July 1919, and expressed to be made between J. B. of the one part and the said W. L. of the other part, in consideration of £1,000 to the said J. B. paid by the said W. L., the said J. B. covenanted with the said W. L. that he the said J. B., or his heirs and all other necessary parties (if any) would forthwith surrender into the hands of the lord of the manor of X., in the county of Y., according to the Recital of mortgage;

(*a*) This is supposed to be a transfer of the mortgage, *supra*, Precedent XXV., p. 307, on which there has been the conditional surrender, *supra*, p. 309. The mortgagor not being a party, there must be an admittance of the mortgagee under the surrender, and then a surrender by him to the use of the transferee subject to the mortgagor's equity of redemption. If the mortgagor is a party, the conditional surrender entered on the Court rolls should be vacated by an entry on the Court rolls of satisfaction on the payment by the transferee of the amount due to the mortgagee; and there should then be a new conditional surrender by the mortgagor to the transferee in pursuance of a covenant to surrender contained in the deed of transfer. If the mortgagee has been admitted on the conditional surrender by the mortgagor, there must be covenants by the mortgagee "as mortgagee" (and if the mortgagor joins, by him also, "as beneficial owner"), to surrender to the use of the transferee.

custom thereof certain lands and hereditaments holden of the said manor, and therein particularly described to the use of the said W. L., his heirs and assigns, according to the custom of the said manor, by and under the rents, fines, suits, and services due and of right accustomed for the same, Subject to a condition for making void the said surrender on payment by the said J. B., his heirs, executors, administrators or assigns, to the said W. L., his executors, administrators, or assigns of the sum of £1,000, with interest for the same in the meantime at the rate of £6 per cent. per annum on the 1st day of January then next, And in the said indenture of mortgage were also contained usual covenants by the said J. B. for payment of the said sum of £1,000 and interest as aforesaid;

—of conditional surrender;

And whereas in pursuance of the covenant in that behalf contained in the said indenture of mortgage, the said J. B. did, on the 2nd day of July, 1919, out of court surrender into the hands of the lord the said lands and hereditaments so covenanted to be surrendered as aforesaid to the use of the said W. L., his heirs and assigns, as aforesaid, subject to such condition for making void the said surrender as aforesaid;

—of state of mortgage debt;

And whereas the said sum of £1,000, together with the sum of £60 for interest thereon from the —— day of ——, 19— (making the total sum of £1,060), remains owing to the said W. L. on the security of the said indenture of mortgage;

—of agreement for transfer.

And whereas the said F. T. has agreed to pay to the said W. L. the said sum of £1,060 upon having such transfer as is hereinafter contained of the said mortgage debt of £1,000 and interest, and the securities for the same:

Witnesseth; assignment of mortgage debt.

Now this Indenture witnesseth that, in pursuance of the said agreement, and in consideration of the sum of £1,060 now paid by the said F. T. to the said W. L. (the receipt whereof the said W. L. doth hereby acknowledge), He the said W. L. as Mortgagee doth, &c. [*assignment of mortgage debt of* £1,000 *and interest, as above*, p. 312]:

Witnesseth, secondly: covenant to surrender.

And this Indenture also witnesseth that, in further pursuance of the said recited agreement, and for the consideration aforesaid, the said W. L. as Mortgagee hereby

COVENANTS with the said F. T., his executors, administrators, and assigns, that he the said W. L. will forthwith, at the cost of the said F. T., his executors, administrators, or assigns, procure himself to be admitted tenant to the said land and hereditaments comprised in the said surrender of the 2nd day of July, 1919, pursuant to the said surrender, and will, as soon as conveniently may be after such admittance, SURRENDER the same lands and hereditaments into the hands of the lord of the said manor of X., TO THE USE OF the said F. T., his heirs and assigns, according to the custom of the said manor, &c., SUBJECT to such right or equity of redemption as the said lands and hereditaments are now subject to by virtue of the said indenture of mortgage on payment to the said F. T., his executors, administrators, or assigns, of the said sum of £1,000 and the interest now due and henceforth to become due for the same:

Trust until surrender.

AND WILL in the meantime, until such surrender, stand seised and possessed of the said lands and hereditaments IN TRUST for the said F. T., his heirs and assigns, subject as aforesaid.

IN WITNESS, &c.

XXXII.

RECONVEYANCE *of* FREEHOLDS *Mortgaged in Fee* (*a*).

THIS INDENTURE, made the —— day of ——, 19—,

Parties.

BETWEEN M. of, &c. [*mortgagee*], of the one part, and A. of, &c. [*owner of equity of redemption*], of the other part:

Recital of mortgage;

WHEREAS [*recite mortgage, ut supra*, p. 304];

—of state of mortgage debt,

AND WHEREAS the principal sum of £250 only remains owing to the said M. on the security of the hereinbefore recited indenture, all interest thereon having been paid up to the date of these presents, and the said A. is desirous of pay-

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(*a*) The reconveyance is usually made by indorsed deed, in which case recitals may be omitted: see Elph. Conv. 285, and see Precedent XXXIV.

—and desire to pay it off.

ing off the said sum of £250, and of having such reconveyance as is hereinafter contained:

Witnesseth.

Now this Indenture witnesseth that, in consideration of

Consideration.

the premises and of the sum of £250 this day paid by the said A. to the said M. (the receipt whereof the said M. doth

Receipt.

hereby acknowledge), He the said M., as Mortgagee doth

Grant.

hereby grant unto the said A., his heirs and assigns,

Parcels.

All the said hereditaments and premises by the hereinbefore recited indenture expressed to be granted as aforesaid,

And all other hereditaments, if any, now vested in the said M. subject to redemption by virtue of the same indenture, with the appurtenances,

Habendum.

To hold the said premises unto and to the use of the said

Discharged from the mortgage debt.

A., his heirs and assigns, discharged from all principal moneys and interest secured by, and all claims under the hereinbefore recited indenture.

In witness, &c.

XXXIII.

Warrant *to enter up* Satisfaction *on a* Conditional Surrender *of Mortgaged Copyholds on payment off.*

Manor of X. } I, W. L. of, &c. [*mortgagee*], do
County of Y. } hereby admit that I have received all principal moneys and interest, the payment whereof was secured to me by a conditional surrender dated the 2nd day of July, 1919, by J. B. of, &c. [*mortgagor*], of certain copyhold or customary hereditaments, situate, &c. held of the said manor; And I authorise and direct the steward of the said manor to enter satisfaction of the said conditional surrender on the rolls of the said manor; and for so doing this shall be his sufficient warrant and authority.

Dated this —— day of ——, 19—,

(Signed) W. L.

XXXIV.

RECONVEYANCE *of Mortgaged* LEASEHOLDS, *by* INDORSEMENT *on the Mortgage Deed.*

THIS INDENTURE, made the —— day of ——, 19—, BETWEEN the within-named W. L. [*mortgagee*], of the one part, and the within-named J. B. [*mortgagor*], of the other part:

WITNESSETH that, in consideration of all interest on the within-mentioned sum of £1,000 having been paid up to the date of these presents, and of the sum of £1,000 now paid by the said J. B. to the said W. L. (the receipt whereof the said W. L. doth hereby acknowledge as being in full discharge of all principal moneys and interest secured by or now owing under the within-written indenture), the said W. L. AS MORTGAGEE doth hereby ASSIGN, SURRENDER, AND RELEASE unto the said J. B.,

ALL AND SINGULAR the hereditaments and premises comprised in or demised (*a*) by the within-written indenture, or which are now by any means vested in the said W. L., subject to redemption by virtue of the said indenture (*b*), to the intent that the term of years granted by the within-written indenture may merge in the term of years granted by the within-recited indenture of lease and become extinguished, and that the said hereditaments and premises may henceforth be held by the said J. B., his executors, administrators, and assigns, discharged from the said sum of £1,000 and the interest thereon, and all moneys now or at any time owing on the security of the within-written indenture, and from all charges, claims, and demands thereunder, or otherwise howsoever.

IN WITNESS, &c.

(*a*) If the mortgage was by assignment, substitute "assigned."

(*b*) If the mortgage was by assignment, say:—

"TO HOLD the said hereditaments and premises hereby assigned UNTO the said J. B., his executors, administrators, and assigns, for all the residue now unexpired of the term of years granted by and subject to the rent and covenants by the lessee reserved by and contained in the within-written indenture of lease."

XXXV.

Sub-mortgage *of a* mortgage *of* freeholds.

THIS INDENTURE, made the —— day of ——, 1920,

Parties. Between A. of [*mortgagor*], (hereinafter referred to as the sub-mortgagor), of the one part, and B., of [*mortgagee*] (hereinafter referred to as the sub-mortgagee), of the other part:

Recital of mortgage and that principal and interest are now owing; —of agreement for loan. Whereas [*recite the original mortgage by C. to A. for £1,000, and that principal and interest are now owing*]:

And whereas the sub-mortgagee has agreed to lend the sub-mortgagor the sum of £500 upon having the repayment thereof with interest, as hereinafter mentioned, secured in manner hereinafter appearing:

Witnesseth. Consideration; assignment of mortgage debt. Now this Indenture witnesseth that, in pursuance of the said agreement and in consideration of £500 to the sub-mortgagor this day paid by the sub-mortgagee (the receipt whereof the sub-mortgagor doth hereby acknowledge) the sub-mortgagor as beneficial owner, doth hereby assign unto the sub-mortgagee, all that the said sum of £1,000 now owing to the sub-mortgagor on the security aforesaid and all interest due and to accrue due for the same, and the full benefit of the securities for the same moneys:

Power of attorney. Together with power for the sub-mortgagee to use the name of the sub-mortgagor for the purpose of demanding, suing for, recovering and giving receipts for the said principal sum of £1,000, and all interest due and to become due for the same, and for the purposes aforesaid, or any of them, to execute and do all such instruments and things as shall be deemed necessary or expedient (*a*).

Habendum. To hold the premises unto the sub-mortgagee;

Witnesseth, secondly. And this Indenture also witnesseth that, in further pursuance of the said agreement, and for the consideration

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(*a*) A mortgage of a legal chose in action made in the form of a conveyance with a proviso for redemption is "an absolute assignment" within the meaning of the Judicature Act, 1873 (*Tancred* v. *Delagoa Bay Co.* 23 Q. B. D. 239; *Bateman* v. *Hunt* [1904] 2 K. B. 530) and therefore this power of attorney is not strictly necessary unless notice cannot at once be given to the original mortgagor (Elph. Conv. 290).

aforesaid the sub-mortgagor, AS MORTGAGEE, doth hereby grant unto the sub-mortgagee his heirs and assigns Grant.

ALL THE said messuages, lands, hereditaments, and premises, by the hereinbefore recited indenture expressed to be granted,

TO HOLD the last mentioned premises UNTO and TO THE USE of the sub-mortgagee, his heirs and assigns, subject to the equity of redemption subsisting therein under the same indenture: Habendum.

PROVIDED ALWAYS that if the sub-mortgagor or the persons deriving title under him, shall pay unto the sub-mortgagee or the persons deriving title under him the said sum of £500 with interest for the same in the meantime at the rate of £—— per cent. per annum on the —— day of —— next, then the sub-mortgagee, &c., will at any time thereafter, upon the request and at the cost of the sub-mortgagor, &c., reassign and reconvey the said mortgage debt, mortgaged hereditaments and premises hereinbefore assigned and granted respectively unto the sub-mortgagor, his executors, administrators and assigns, or as he and they shall direct, and as regards the said hereditaments in fee-simple, and subject to such equity of redemption as aforesaid. Proviso for redemption.

[*Covenant for payment of principal and interest, and of interest after default, as above*, p. 306].

PROVIDED ALWAYS that the sub-mortgagee, or the persons deriving title under him, shall not be bound or concerned to enforce or realise the hereinbefore recited security; unless he or they should think fit, and shall not be answerable for any loss occasioned by delay or omission so to do, nor shall this present security be prejudiced or affected by such delay or omission. Sub-mortgagee not to be bound enforce original security.

IN WITNESS, &c.

XXXVI.

Disentailing Deed *of* Freeholds *by* Tenant *in* Tail *in* Possession (*a*).

THIS INDENTURE, made the —— day of ——, 19—,

Parties. Between T. T. of, &c. [*tenant in tail*], of the one part, and G. V. of, &c. [*grantee to uses*], of the other part:

Grant. Witnesseth that the said T. T. doth hereby grant unto the said G. V.,

All and singular the freehold messuages, lands, tenements, and hereditaments, situate or arising (*b*) in the several parishes of X. and Y., in the county of Z. or elsewhere, of or to which he the said T. T. is seised or entitled at law or in equity for any estate in tail male or in tail, under an indenture dated the —— day of ——, 18—, and expressed to be made between L. T. of the first part, C. F. of the second part, and K. T. and J. F. of the third part, or otherwise howsoever.

Habendum discharged from estates tail. To have and to hold the same unto the said G. V. and his heirs, discharged from all estates in tail male or in tail of the said T. T. at law or in equity, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail, to the use of the said T. T., his heirs and assigns, for ever.

In witness, &c.

XXXVII.

Disentailing Deed *of* Freeholds *by* Tenant *in* Tail, *with the* Consent *of the* Protector.

THIS INDENTURE, made the —— day of ——, 19—,

Parties. Between T. T. [*tenant in tail*], of the first part, L. T. of, &c. [*tenant for life and protector of settlement*], of the

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(*a*) As to disentailing deeds, see Elph. Conv. 633.

(*b*) This word applies to incorporeal hereditaments such as tithe rentcharge or rents of inheritance.

second part, and G. V. of, &c. [*grantee to uses*], of the third part:

WHEREAS, by an indenture of settlement dated the —— day of ——, 18—, and expressed to be made between [*parties*], certain manors, messuages, lands, and hereditaments in the parishes of X. and Y., in the county of Z., in the same indenture described or referred to, were limited to the use of the said L. T. and his assigns during his life, without impeachment of waste, with remainder to the use of the first and other sons of the said L. T. successively, according to their respective seniorities in tail; with remainders over; — Recital of creation of the entail;

AND WHEREAS the said T. T. is the first son of the said L. T., and attained his age of twenty-one years on the —— day of ——, 19—: — of the birth and majority of the tenant in tail.

NOW THIS INDENTURE WITNESSETH, that he the said T. T., with the consent of the said L. T. as protector of the settlement (testified by his executing these presents), doth hereby GRANT unto the said G. V., — Witnesseth.

ALL the manors, messuages, lands, and hereditaments comprised in or assured by the hereinbefore recited indenture of settlement, or which by virtue of any conveyance to the uses of the same indenture, or any exchange or otherwise howsoever, have become, either at law or in equity, subject to the subsisting uses of the same indenture of settlement, — Conveyance. Freehold parcels.

TO HOLD the same premises UNTO the said G. V. and his heirs, SUBJECT and without prejudice to the estate for life of the said L. T., and to such of the powers and privileges thereto annexed, or exercisable during the continuance thereof, as are now subsisting or capable of being exercised, but discharged from all estates in tail of the said T. T. at law or in equity, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail, TO THE USE OF the said T. T., his heirs and assigns. — Habendum.

IN WITNESS, &c.

XXXVIII.

DISENTAILING DEED *of* FREEHOLDS *by* TENANT *in* TAIL *with the* CONSENT *of the* PROTECTOR *of the Settlement (the estate being Limited to their Joint Appointment)* (*a*).

THIS INDENTURE, made the —— day of ——, 19—, BETWEEN L. T. of, &c. [*tenant for life and protector*], of the first part, T. T. of, &c. [*tenant in tail*], of the second part, and J. S. of, &c., and R. B. of, &c. [*trustees*], of the third part:

Recital of settlement.

WHEREAS by an indenture of settlement dated the —— day of ——, 18—, and expressed to be made between the said L. T. of the first part, C. F. of the second part, and K. T. and J. F. of the third part, certain manors, messuages, lands, and hereditaments in the several parishes of X. and Y. in the county of Z., in the same indenture more particularly described, were limited to the use of the said L. T. and his assigns during his life, without impeachment of waste, with remainder to the use of the first and other sons of the said L. T. successively, according to their respective seniorities in tail male, with remainders over;

AND WHEREAS the said T. T. is the first son of the said L. T., and attained his age of twenty-one years on the —— day of ——, 19—,

Introductory recitals.

AND WHEREAS the said L. T. and T. T. are desirous of barring the estate in tail male, and all other estates in tail of the said T. T. in the said hereditaments and premises, and all estates, interests, and powers to take effect after the determination or in defeasance thereof, and of assuring and limiting the said hereditaments and premises in manner hereinafter expressed:

Witnesseth.

NOW THIS INDENTURE WITNESSETH that, in pursuance of such desire, and in consideration of the premises, the said

Consent.

L. T. and the said T. T., with the consent of the said L. T. as protector of the said settlement, according to their respective estates and interest in the premises, do

(*a*) See Elph. Conv. 640.

respectively GRANT unto the said J. S. and R. B. [*parcels as above, Precedent XXXVII.*], Grant.

TO HAVE AND TO HOLD the same UNTO the said J. S. and R. B. and their heirs, SUBJECT to the uses and estates limited or created by the said indenture of settlement which precede the estate in tail male of the said T. T. (other than the estate thereby limited to the said L. T. and his assigns for his life) and to the powers annexed to or exercisable during the continuance of such preceding uses and estates respectively (other than as last aforesaid), and to the uses and estates limited or created or to be limited or created in exercise of such powers, BUT DISCHARGED from all estates in tail male or in tail of the said T. T. at law or in equity, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail, Habendum subject to prior uses, but discharged from estates tail.

TO SUCH USES, upon such trusts, and subject to such powers and provisions as the said L. T. and T. T. shall at any time or times hereafter by any deed or deeds revocable or irrevocable, jointly appoint: To such uses as tenant for life and tenant in tail jointly appoint;

AND IN DEFAULT of and subject to any such joint appointment, TO THE USE OF the said L. T. and his assigns during his life, without impeachment of waste, in restoration and confirmation of the estate for his life limited to him by the hereinbefore recited indenture of settlement, with the powers annexed to such life estate, with remainder to SUCH USES, upon such trusts, and subject to such powers and provisions as the said T. T., in case he shall survive the said L. T., shall at any time or times after the death of the said L. T., by any deed or deeds, revocable or irrevocable, or by will or codicil appoint: and, in default, to tenant for life; remainder to such uses as tenant in tail appoints;

AND IN DEFAULT of and subject to any such appointment, TO THE USES, upon the trusts, and subject to the powers and provisions, to, upon, and subject to which, under or by virtue of the hereinbefore recited indenture of settlement the same premises respectively stood limited and settled immediately before the execution of these presents, or such of the same uses, trusts, powers, and provisions as shall be then subsisting or capable of taking effect, and so as to and, in default, to original uses.

restore and confirm the said uses, trusts, powers, and provisions:

Declaration as to trustees of settlement.

And it is hereby agreed and declared that the said J. S. and R. B. shall be the trustees of the settlement hereby made for the purposes of the Settled Land Act, 1882, and any Act or Acts amending or extending the same.

In witness, &c.

XXXIX.

Strict Settlement *of* Freeholds *on Marriage.*

Parties.

THIS INDENTURE, made the —— day of ——, 19—, Between H. of, &c. [*husband*], of the first part, W. of, &c. [*wife*], of the second part, A. T. of, &c., and B. T. of, &c. [*trustees*], of the third part.

Recitals. Intended marriage;

Whereas a marriage is intended shortly to be solemnized between the said H. and W.;

—title of husband to freehold hereditaments;

And whereas the said H. is seised of the hereditaments specified in the schedule hereto for an estate of inheritance in fee-simple in possession;

—agreement for settlement.

And whereas upon the treaty for the said intended marriage it was agreed that the said hereditaments, and all other (if any) the freehold hereditaments of the said H., in the respective parishes of X. and Y., in the county of Z. (*a*), should be settled in manner hereinafter appearing:

Witnesseth.

Now this Indenture witnesseth that, in pursuance of the said agreement, and in consideration of the said intended marriage, the said H. as Settlor (*b*), with the approbation of the said W., doth hereby

Grant.

grant unto the said A. T. and B. T.,

Parcels.

All those [*parcels*], all which said hereditaments are more particularly described in the schedule hereto, and all

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(*a*) These words (in the recital and in the operative part, *infra*), are added in order to guard against any accidental omissions in the description contained in the schedule.

(*b*) The words imply a covenant for further assurance under Conv. Act, 1881, s. 7 (1) (*E*). Full covenants for title may be implied by substituting "As Beneficial Owner."

other (if any) the freehold hereditaments of or belonging to him the said H., situate in the respective parishes of X. and Y., in the county of Z.,

Habendum; until the marriage: and afterwards,

To HOLD the same UNTO the said A. T. and B. T., and their heirs, TO THE USE of the said H. and his heirs until the said intended marriage, and afterwards.

rent-charge to wife for pin money;

To THE USE that the said W. shall, during the joint lives of herself and the said H., receive out of the premises for her separate use, and without power of anticipation, the yearly rent-charge of £100, to commence from the solemnization of the said intended marriage, and to accrue from day to day, but to be paid without any deduction by equal quarterly payments, the first thereof to be made at the end of three calender months from the solemnization of the said intended marriage, if the said W. and H. be both then living (*c*); AND, subject and charged as aforesaid.

—subject thereto, to use of husband for life.

To THE USE of the said H. and his assigns during his life [*if so intended, add*, "without impeachment of waste"]; and from and after his decease,

Remainder, jointure rent-charge to wife;

To THE USE that, if the said W. shall survive the said H., the said W. and her assigns shall thenceforth receive during her life the yearly rent-charge of £1,000 by way of jointure and in bar of all dower and freebench, to be considered as her separate property, without power of anticipation, whilst she shall be under the now intended coverture (*d*) and to be charged upon and issuing out of all the said hereditaments hereby settled, and to be considered as accruing from day to day, but to be payable by four equal quarterly payments without any deduction, the first of such payments to be made at the end of three calendar months after the death of the said H., if the said W. shall be then living (*e*); AND, subject and charged as aforesaid,

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(*c*) The Conv. Act, 1881, s. 44, confers on the wife the remedies for recovery of the rent-charge formerly given by express powers contained in the settlement, viz., power to distrain after default in payment for 21 days; power to enter and take the rents and profits after default for 40 days; and, in the like case, power to demise for a term to trustees upon trust to raise the charge.

(*d*) Sometimes the restraint is extended to any subsequent coverture.

(*e*) See note (*c*) above.

To THE USE of the said A. T. and B. T., their executors, administrators, and assigns, for the term of 1,000 years, to commence from the death of the said H., without impeachment of waste, upon the trusts hereinafter declared, and subject thereto.

—remainder for term of 1000 years to trustees of portions;

To THE USE of the first and every other son of the said H. by the said W. successively in remainder, one after the other, according to their respective seniorities, and the heirs male of their respective bodies, AND in default of such issue,

—remainder to sons successively in tail male;

To THE USE of the first and every other son of the said H. by the said W. successively in remainder, one after the other, according to their respective seniorities, and the heirs of their respective bodies (*f*), AND in default of such issue,

—remainder to the sons in tail general;

To THE USE OF all the daughters of the said H. by the said W., and the heirs of their respective bodies, as tenants in common in equal shares;

—remainder to the use of daughters as tenants in common in tail, with cross remainders;

AND IF and so often as there shall be a failure of issue of any such daughter, then, as well as to her original share as to any share or shares which shall have accrued to her or the heirs of her body by virtue of this present limitation,

To THE USE OF the others of such daughters and the heirs of their respective bodies as tenants in common in equal shares;

AND IF there shall be a failure of issue of all such daughters but one, or if there shall be but one such daughter, then as to the entirety of the same premises, TO THE USE OF such one or only daughter and the heirs of her body;

—ultimate remainder.

AND in default of such issue, TO THE USE OF the said H., his heirs and assigns:

Trusts of portions term.

AND IT IS HEREBY AGREED AND DECLARED, that the said premises are hereby limited to the said A. T. and B. T., their executors, administrators, and assigns, for the said term of 1,000 years UPON TRUST, if there shall be any younger child or children of the said intended marriage (meaning thereby any child or children who being a son or sons shall

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(*f*) Or the limitations may by virtue of the Conv. Act, 1881, s. 51, be "To THE USE of the first . . . seniorities in tail male, with the remainder TO THE USE of the first . . . seniorities in tail."

attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, other than any son or sons who before attaining the age of twenty-one years shall become entitled, or any daughter or daughters who before attaining that age or marrying shall become indefeasibly entitled, whether in possession or remainder, under or by virtue of these presents, to the said hereditaments hereby settled for the first estate in tail), then the said A. T. and B. T. shall, after the death of the said H. or in his lifetime at his request in writing, raise by mortgage or sale or demise of the said premises or any part thereof, for all or any part of the said term, or by or out of the rents and profits of the said premises or any part thereof, or by the sale of timber or minerals, or by all or any of the means aforesaid, the sum of [£10,000], and shall hold the same sum in trust for all or such one or more exclusively of the others or other of the said younger children, at such age or time or respective ages or times (*g*), if more than one in such shares and with such future or other trusts for the benefit of any such younger child or children, and upon such conditions, with such restrictions, and in such manner as the said H. shall by any deed or deeds, revocable or irrevocable, or by will or codicil appoint;

And in default of and subject to any such appointment, in trust for the said younger children or child, if more than one, in equal shares as tenants in common (*h*);

Provided always, and it is hereby agreed, that the said A. T. and B. T. shall be the trustees of these presents, for the purposes of the forty-second section of the Conveyancing and Law of Property Act, 1881, the powers and provisions whereof shall apply to these presents; And that any accumulated fund arising from the rents and profits of the

As to management by trustees during minorities; by reference to C. A., 1881, s. 42.

(*g*) It will be observed that, as only those children who attain 21, or, if daughters, marry, are included in the class of "younger children" as defined in the early part of this clause, no appointment can be made so as to give any vested interest to a child unless he or she attains 21, or, if a daughter, marries.

(*h*) Here may be added ancillary provisions, such as hotchpot, maintenance and advancement clauses (for examples of such clauses, see *post*, pp. 337, 345 (*g*).

hereditaments hereby settled during the minority of any tenant in tail by purchase, shall (without prejudice to the power to apply the same at any time as if the same had been rents and profits of the current year) be held upon the trusts following, that is to say, if the person during whose minority the same shall have been accumulated shall being a male attain the age of twenty-one years, or being a female attain that age or marry, then upon trust for such person, his or her executors or administrators as personal estate; but if such person being a male shall die under the age of twenty-one years, or being a female shall die under that age and without having been married, then upon the trusts and subject to the powers and provisions which would have been applicable thereto if the same had arisen from a sale of the said hereditaments; but so that the whole or any part of such accumulations may at any time be applied for the benefit of any such minor as if the same had been rents and profits arising in the then current year:

Power to husband to jointure future wife.

PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said H. shall survive the said W. and shall marry again, it shall be lawful for the said H. at any time, whether before or after such marriage, by deed revocable or irrevocable or by will or codicil to appoint to his after-taken wife, in the event of her surviving him, for her life or any less period, a rent-charge or rent-charges by way of jointure, not exceeding the annual sum of £——, to be charged upon an or any of the hereditaments hereby settled, and to be payable without any deductions, at such times and in such manner as the said H. shall direct (*i*) [*power to H. to charge portions for younger children of subsequent marriages,*" of any sum not exceeding in the different events hereinafter specified the different sums hereinafter mentioned, that is to say, if there shall be but one such younger child, the sum of £——, and if but two such younger children, the sum of £——, and if three or more such younger children, the sum of £——;"]

(*i*) As to the powers and remedies for securing payment of a rent-charge see Conv. Act, 1881, s. 44, and *supra*, p. 329 note (*c*).

AND IT IS HEREBY AGREED, that the said A. T. and B. T. shall be and they are hereby appointed trustees of these presents, for the purposes of the Settled Land Act, 1882, and any Act or Acts extending, amending, or re-enacting the same. Appointment of trustees for purposes of Settled Land Acts.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

[*Description of Lands settled.*]

XL.

MARRIAGE SETTLEMENT *of* FREEHOLDS *by way of* TRUSTS *of* PROCEEDS *of* SALE.

(A) CONVEYANCE *of the Freeholds in Trust for Sale.*

THIS INDENTURE, made the —— day of ——, 19—,

BETWEEN H. of, &c. [*husband*], of the first part, W. of, &c. [*wife*], of the second part, and A. T. of, &c., B. T. of, &c., and C. T. of &c. [*trustees*], of the third part: Parties.

WITNESSETH that, in pursuance of an agreement made on the treaty for the marriage which is intended to be solemnized between the said H. and W., and in consideration thereof, the said H. AS SETTLOR (*a*), with the approbation of the said W., hereby conveys unto the said A. T., B. T., and C. T., Witnesseth. Conveyance of freeholds.

ALL THAT [*parcels*],

TO HOLD unto the said A. T., B. T., and C. T., in fee-simple TO THE USE OF the said H. in fee-simple, until the said intended marriage shall be solemnized, Habendum to trustees.

AND after the solemnization thereof, TO THE USE OF the said A. T., B. T., and C. T., their heirs and assigns, UPON THE TRUSTS hereinafter declared:

AND IT IS HEREBY AGREED, that the said A. T., B. T., and C. T., shall, after the solemnization of the said intended Trusts of freeholds for sale.

(*a*) These words imply a limited covenant for further assurance by virtue of Conv. Act, 1881, s. 7 (1) (*E*). If the full covenants for title are to be implied, the words "AS BENEFICIAL OWNER" will be substituted.

marriage, stand seised of the hereditaments hereby conveyed UPON TRUST that the said A. T., B. T., and C. T., or other the trustees or trustee for the time being of these presents (hereinafter called the trustees) (*b*) shall sell the same or any part or parts thereof, but during the joint lives of the said H. and W., or the life of the survivor of them, with their consent or the consent of such survivor in writing (*c*),

Trusts of proceeds of sale

AND SHALL stand possessed of the net money to arise from any such sale (after payment of all costs incidental to such sale or otherwise incurred in respect of the premises) and also of the rents and profits of the said hereditaments until sale, UPON THE TRUSTS and subject to the powers and provisions declared and contained concerning the same, by and in an indenture intended to bear even date with these presents, and to be made between the same parties (*d*):

by reference to deed of even date.

Power to postpone sale

AND IT IS HEREBY AGREED, that the said hereditaments may be retained unsold so long as the trustees think proper, but shall be deemed to be personal estate, and shall devolve as such:

Power to lease, &c., by reference to

AND THAT the trustees may exercise in relation to the said

(*b*) By the Trustee Act, 1893, s. 10, new trustees subsequently appointed have the powers, etc., of the original trustees; and by the Trustee Act, 1893, s. 22, re-enacting the Conveyancing Act, 1881, s. 38, where a power or trust is given to or vested in two or more trustees jointly then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivors or survivor of them for the time being: and by the Conveyancing Act, 1911, s. 8, any power or trust capable of being exercised by a sole or last surviving or continuing trustee is exercisable until the appointment of new trustees by his personal representative; so that the mention of survivors or survivor or of the executor of such survivor is now unnecessary in any case (Elph. Conv. 407).

(*c*) The ancillary powers formerly expressly given are supplied by Conv. Act, 1881, s. 35; and power to give receipts for purchase money by s. 36.

(*d*) A reference to the trusts of the indenture of even date may be convenient in order to show who has the powers of tenant for life under the Settled Land Act, 1882, s. 63, and accordingly some such words as the following are sometimes added in this place:—

"under which trusts the said H. is tenant for life, and after his death the said W. becomes tenant for life of the proceeds of sale, and after the death of both the said H. and W. the capital is to be held in trust for their issue."

hereditaments all such powers of leasing and accepting surrenders of leases, and entering into varying and rescinding contracts in that behalf, and powers incidental or subsidiary thereto respectively, and all such other powers of every description which may be applicable to the said hereditaments as are, by the Settled Land Act, 1882, or any Act or Acts extending, amending, or re-enacting the same, conferred on tenants for life (*e*); Settled Land Acts.

AND THAT the said H. and W. during their joint lives, and the survivor of them during his or her life, shall have power to appoint new trustees of these presents. Power to appoint new trustees.

IN WITNESS, &c.

(B) SETTLEMENT *of Proceeds of Sale of Freeholds conveyed in trust for Sale by Deed of even date (last Precedent).*

THIS INDENTURE, made the —— day of ——, 19—, BETWEEN H. of, &c. [*husband*], of the first part, W. of, &c. [*wife*], of the second part, and A. T. of, &c., B. T. of, &c., and C. T. of, &c. [*trustees*], of the third part: Parties.

WHEREAS a marriage is intended to be solemnized between the said H. and W.; Recital of intended marriage;

AND WHEREAS, by an indenture bearing even date with but executed before these present, and made between the same parties and in the same order as these presents, the said H. with the approbation of the said W. conveyed the hereditaments therein mentioned to the use of the said A. T., B. T., and C. T., their heirs and assigns, UPON THE TRUSTS after the solemnization of the said intended marriage thereinafter declared; And it was thereby agreed that the said A. T., B. T., and C. T., their executors, administrators, and assigns, should after the solemnization of the said marriage stand seised of the hereditaments thereby conveyed upon trust to sell the same as therein mentioned, and to stand possessed of the net money to arise from any such sale —conveyance of even date;

(*e*) By virtue of the Settled Land Act, 1884, ss. 6 and 7, these powers in a settlement by way of trust for sale can be exercised without the consent of the tenant for life unless he has obtained an order of Court enabling him to exercise the statutory powers.

or (after payment of all costs incidental to such sale otherwise incurred in respect of the premises), and also of the rents and profits of the said hereditaments until sale, upon the trusts and subject to the powers and provisions declared concerning the same by an indenture therein referred to, meaning these presents;

—agreement for settlement.

AND WHEREAS upon the treaty for the said marriage it was agreed that such settlement should be executed as is hereinafter contained:

Witnesseth: Trusts of proceeds of sale;

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration of the said marriage, it is hereby AGREED AND DECLARED that the said A. T., B. T., and C. T., shall, after the solemnization of the said marriage, stand possessed of the net money to arise from any sale pursuant to the said recited indenture of even date herewith, as and when the same shall be received, UPON TRUST that the said A. T., B. T., and C. T., or other the trustees or trustee for the time being of these presents (hereinafter called the trustees) (*f*), SHALL, with the consent of the said H. and W. during their joint lives or of the survivor of them during his or her life and after the death of both at the discretion of the trustees invest such net money as aforesaid in [*specify investments authorised*]; with power for the trustees from time to time with such consent or at such discretion as aforesaid, to change such investments for others of a like nature;

—to invest and vary investments.

Trusts of investments.

AND IT IS HEREBY AGREED, that the trustees shall stand possessed of such net money as aforesaid, and of the investments for the time being representing such net money (which said net money and investments are hereinafter referred to as the trust fund), And also of the annual income of the trust fund,

—income to husband for life, and then to wife for life;

UPON TRUST to pay such annual income to the said H. during his life, and after his death to pay the same to the said W. during her life if she shall survive him, for her separate use, without power of anticipation during any coverture;

(*f*) See note (*b*) above p. 334.

—after death of survivor trusts for issue as husband and wife or survivor shall appoint;

AND IT IS HEREBY AGREED that after the death of the survivor of the said H. and W., the trustees shall stand possessed of the trust fund and the income thereof, IN TRUST for all or any such one or more exclusively of the others or other of the issue of the said marriage, whether children or remoter issue, at such time, in such shares and with such gifts over, and generally in such manner for the benefit of such issue or some or one of them as the said H. and W. shall by deed revocable or irrevocable from time to time or at any time jointly appoint;

AND in default of and until and subject to any such appointment, then as the survivor of them, and as regards the said W. whether covert or sole, shall by deed revocable or irrevocable, or by will or codicil appoint;

—in default of appointment, for children (sons who attain 21, daughters who attain 21 or marry), in equal shares.

AND in default of and until and subject to any such appointment, IN TRUST for all or any the children or child of the said marriage who, being sons or a son attain the age of twenty-one years, or being daughters or a daughter attain that age or marry, and if more than one in equal shares:

Hotchpot clause.

PROVIDED ALWAYS that any child who or whose issue takes any part of the trust fund under any appointment in pursuance of either of the powers lastly hereinbefore contained shall not (in the absence of any appointment to the contrary) take any share in the unappointed part thereof without bringing the share or shares appointed to him or her, or to his or her issue, into hotchpot, and accounting for the same accordingly:

Advancement clause.

AND IT IS HEREBY agreed that the trustees may at any time or times after the death of the said H. and W., or in their, his, or her lifetime with their, his, or her consent in writing, raise any part or parts, not exceeding together one-half of the then expectant, presumptive, or vested share of any child of the said marriage under the trusts aforesaid, and may pay or apply the same for his or her advancement or benefit (*g*).

Trusts in default of issue.

AND IT IS HEREBY AGREED, that, if there should not be any child of the said marriage who attains a vested interest under

(*g*) The Conv. Act, 1881, s. 43, supplies the "maintenance and accumulation" clauses formerly inserted in this place; see *post*, p. 345 (*g*) where forms of such clauses are given.

the trusts hereinbefore declared then (subject to the trusts and powers hereinbefore contained) the trust fund and the income and statutory accumulations (if any) of the income thereof, or so much thereof as shall not have become vested or been applied under any of the trusts or powers affecting the same, shall after the death of the said W. and such failure of children as aforesaid, be held IN TRUST for the said H. absolutely;

Application of rents and profits until sale.

AND IT IS HEREBY AGREED that, until all the hereditaments by the said recited indenture of even date herewith conveyed in trust for sale are sold, the trustees shall pay or apply the net rents and profits thereof, or of the unsold part thereof (after payment of all rates, taxes, payments for insurance, repairs, and other outgoings, which any tenant or other person is not liable to pay), upon and subject to the like trusts and powers upon and subject to which the annual income of the trust fund is payable or applicable under the trusts herein contained:

Power to appoint new trustees.

AND IT IS HEREBY AGREED that [*power to appoint new trustees as in last Precedent*].

IN WITNESS, &c.

XLI.

APPOINTMENT *by* DEED POLL *by Husband and Wife to a Daughter on her Marriage of Share in Trust Funds comprised in their Marriage Settlement.*

KNOW ALL MEN BY THESE PRESENTS (*a*), that we, F. of, &c. [*husband*], and M. his wife, in pursuance of an agreement entered into upon the treaty for a marriage

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(*a*) If a Deed Poll contains recitals, the form is different, the commencement in that case being—

"TO ALL TO WHOM THESE PRESENTS SHALL COME, A. of, &c., sends greeting.

"WHEREAS [&c.]:

"NOW THESE PRESENTS WITNESS that," &c.

See Elph. Conv. 60.

between our daughter W., and H. of, &c., and in exercise of a power given to us by an indenture of settlement dated the —— day of ——, 18—, and expressed to be made between [*parties*], and of every or any other power in this behalf us enabling, DO hereby irrevocably APPOINT that, SUBJECT to the trusts in the said indenture contained in relation to the income of the trust funds and property for the time being subject to the trusts of the said indenture during the lives of us the said F. and M., and the life of the survivor of us, one equal [fourth] part or share of the said trust funds and property shall, from and after the solemnization of the said marriage, belong to and be vested in the said W., and be held in trust for the said W., her executors, administrators, and assigns, absolutely, and shall be transferable to her or them forthwith, upon the decease of the survivor of us, the said F. and M.

PROVIDED ALWAYS, and the said F. and M. do hereby declare, that if the said now intended marriage shall not take place within six calendar months from the date hereof, these presents, and everything here contained, shall be void.

IN WITNESS, &c.

XLII.

SETTLEMENT *of* PERSONALTY *on a* MARRIAGE.

THIS INDENTURE, made the ——day of ——, 19—,

BETWEEN H. of, &c. [*husband*], of the first part, W. of, &c. [*wife*], of the second part, and A. of, &c., B. of, &c., C. of, &c., and D. of, &c. (which four last-named persons are hereinafter called the trustees), of the third part: Parties.

WHEREAS a marriage has been agreed upon and is intended to be solemnized between the said H. and W.; Recitals; of agreement for marriage;

AND WHEREAS, with a view to the settlement intended to be hereby made, the said H. has caused to be transferred into the joint names of the trustees the several stocks, shares, and other investments mentioned in the first schedule —of transfer by husband of investments mentioned in 1st schedule;

and as to policy on husband's life;

hereto; and has effected (*a*), an assurance on his life for the sum of £1,000 in the [*name of the assurance office*], by a policy No. ——, dated the —— day of ——, 19—, in the names of the trustees, under the annual premium of £——;

—of title of wife to reversionary share in trust funds under parents' settlement;

And whereas, under or by virtue of an indenture of settlement dated the ——day of ——, 18—, and between [*parties*] (being a settlement executed on the marriage of the said (*b*) F. and M., and by virtue of a deed poll (*c*), dated the —— day of ——, 19—, under the hands and seals of the said F. and M. (being a deed of appointment executed under a power contained in the said indenture of settlement), the said W., as one of the children of the said F. by the said M., is now entitled expectant on the death of the said F. and M., and in the meantime subject to their life interests under the said indenture of settlement, and provided the said intended marriage shall be solemnized within six calendar months from the date of the said deed poll, to one [fourth] share of the investments mentioned in the second schedule hereto (being the investments now held upon the trusts of the said indenture of settlement), now standing in the joint names of C. T. and F. T., the present trustees of the said indenture of settlement or of the investments for the time being representing the same; And upon the treaty for the said intended marriage it was agreed that the said [one-fourth] part or share, or other share or shares to which the said W. is now or will upon the said intended marriage become entitled of or in the trust funds or property comprised in the said indenture of settlement, should be assigned to the trustees in manner and upon the trusts hereinafter expressed;

—of wife's title to mortgage

And whereas the said W. is absolutely entitled to a sum of £2,000 and interest secured on mortgage of certain free-

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(*a*) If the policy is in the husband's own name, the recital will be that he is absolutely entitled to it, and that it has been agreed that it shall be assigned to the trustees upon the trusts hereinafter expressed: and then the operative part of the deed will contain an assignment and declaration of trust of the policy.

(*b*) "The said," because F. and M. will have been named as parties to the settlement in recital.

(*c*) See last Precedent.

hold hereditaments situate at X., in the county of Y., by an indenture of mortgage dated the —— day of ——, 19—, and made between [*parties*], and pursuant to an agreement made upon the treaty for the said intended marriage, the said W. has, by an indenture bearing even date with but executed before these presents, and expressed to be made between [*parties*], transferred the said mortgage debt and interest and the securities for the same to the trustees in trust for the said W., her executors and administrators until the said intended marriage, and afterwards upon such trusts and subject to such powers and provisions as should be declared concerning the same by an indenture of even date therewith therein referred to, meaning those presents.

and of transfer to trustees;

And whereas it has also been agreed, that such provision shall be made for the settlement of other or future acquired property of the said W. (except as hereinafter mentioned) as is hereinafter contained;

—of agreement to settle wife's after-acquired property;

And whereas upon the treaty for the said intended marriage it was agreed that such settlement should be executed as is hereinafter contained:

—of agreement for settlement.

Now this Indenture witnesseth that, in pursuance of the said agreement in this behalf and in consideration of the said intended marriage, the said W. as Settlor (*d*), with the approbation of the said H., doth hereby assign unto the trustees,

Witnesseth.

Assignment by wife of reversionary interest.

All that the said [one fourth] part or share, or other the share or shares to which the said W. now is or will upon the said intended marriage or in any other event become entitled in expectancy as aforesaid, under or by virtue of the said indenture of settlement of the —— day of ——, 18—, and the said deed poll of appointment of the —— day of ——, 19—, of or in the trust funds and property comprised in or which are now or may at any time become subject to the trusts of the said indenture of settlement:

To hold the same (subject to the interests of the said F. and M. therein) unto the trustees, their executors,

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(*d*) These words imply a limited covenant for further assurance by virtue of Conv. Act, 1881, s. 7 (1) (*E*).

administrators, and assigns, IN TRUST for the said W., her executors and administrators, until the said intended marriage, and afterwards upon the trusts and subject to the powers and provisions hereinafter declared and contained concerning the same:

Declaration of trusts of the settled property.

AND IT IS HEREBY AGREED and declared, that in case the said intended marriage shall take place, the trustees shall, after the solemnization of the said intended marriage, stand possessed of the investments mentioned in the first schedule hereto, and of all the moneys assured by or to become payable under the said policy of assurance, and of the said one-fourth part or share, or other the share or shares hereinbefore assigned, and of the said mortgage debt of £2,000 and interest, which have been transferred to the trustees by the hereinbefore recited indenture of even date herewith, UPON TRUST that the trustees, or other the trustees or trustee for the time being of these presents (hereinafter called the trustees) shall either permit the investments mentioned in the first schedule hereto, and also the said part or share or shares hereby assigned, as and when the same shall fall into possession and be received by the trustees (or so much thereof as shall not be received in money), and the said mortgage debt or any of the premises or any part or parts thereof, to remain on the securities or investments on which the same now are or shall be received: OR SHALL, with the consent of the said H. and W. during their joint lives, or of the survivor of them during his or her life, and after the death of both at the discretion of the trustees, sell, call in, or convert into money, all or any of the said investments, or any of the said premises which shall not be received in money, AND SHALL, with the like consent or at the like discretion, INVEST the money arising thereby, and also the said policy moneys, and any moneys received in respect of the premises or any of them, in the names or name of the trustees in manner following, and not otherwise, that is to say, IN [*specify investments authorized*], WITH POWER for the trustees from time to time with such consent or at such discretion as aforesaid, to change such investments for others of a like nature:

Trusts as to investment.

Power to vary investments.

Trusts of investments representing husband's trust fund and wife's trust fund respectively.

AND IT IS HEREBY AGREED, that the trustees or trustee shall stand possessed of the investments mentioned in the first schedule hereto, and of the said policy moneys, and of the investments for the time being representing the same respectively, all of which are hereinafter referred to as the Husband's Trust Fund, And shall also stand possessed of the said part or share or shares hereinbefore assigned and of the said mortgage debt of £2,000, and of the investments for the time being representing the same respectively, which said part, or share or shares, and mortgage debt, and the investments representing the same respectively, are hereinafter referred to as the Wife's Trust Fund, And also of the annual income of the Husband's Trust Fund and the Wife's Trust Fund respectively, upon the trusts, and subject to the powers and provisions following, that is to say:

Income of husband's trust fund, to him for life,

AS TO THE HUSBAND'S TRUST FUND, upon trust to pay the annual income thereof to the said H. during his life (*e*), and

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(*e*) Sometimes a trust of income for the husband is made determinable on bankruptcy (where the property settled does not belong to the husband himself; see *infra* at end of this note) or alienation, so as to give him a "protected life interest" (see Elph. Conv. 439): in which case the trustees are to pay the income to him—

"during his life, or until he shall become bankrupt, or shall assign or charge or affect to assign or charge the said income or some part thereof, or until some other event shall happen (other than a consent to any exercise of the power of advancement hereinafter contained) whereby the said income, or any part thereof, if belonging absolutely to him, would become vested in or payable to some other person or persons."

And this may be followed by a discretionary trust "after the determination during the life of the husband of the trust hereinbefore declared of the said income in his favour, from time to time during the remainder of his life, or during such shorter period or periods, either continuous or discontinuous, as the trustees or trustee shall in their or his absolute discretion think fit, to pay all or any part of the said income to or apply the same for the maintenance and personal support or benefit of all, or any one or more to the exclusion of the other or others, of the following persons, namely, the said H. and his wife, if any, and his children or remoter issue for the time being in existence and whether minors or adults, and the other persons or person for the time being entitled to or interested in the trust fund under the trusts herein contained to take effect after the decease of the said H.." and subject to this discretionary trust the trustees are directed to hold the income during

and then to wife for life.

after his death to pay the same annual income to the said W. during the residue of her life, if she shall survive him, for her separate use without power of anticipation during any coverture:

Income of wife's trust fund to her for life and then for husband.

AND AS TO THE WIFE'S TRUST FUND, upon trust to pay the annual income thereof to the said W. during her life for her separate use without power of anticipation during any coverture, And after her death, to pay the same annual income to the said H., during the residue of his life, if he shall survive her (*f*):

After death of survivor capital for issue

AND IT IS HEREBY AGREED, that after the death of the survivor of the said H. and W., the capital and income of the Husband's Trust Fund, and also of the Wife's Trust Fund, shall be held IN TRUST for all or such one or more exclusively of the others or other of the issue of the said intended marriage, [*&c. as the parents jointly appoint, and in default as the survivor appoints: see form above, Precedent XL.* (*B*), p. 337].

as parents appoint;

in default of appointment, for children.

AND in default of and until and subject to any such appointment, in TRUST for [*the children who attain twenty-one or if daughters, marry, as above, Precedent XL.* (B), p. 337].

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the rest of the husband's life upon the same trusts as if the husband were dead.

It must, however, be remembered that if or so far as the trust fund consists of property which is brought into settlement by the husband himself, his interest in the income cannot be made determinable on his own bankruptcy, though it may be made determinable on any attempt by him to alienate or charge it (see Elph. Conv. 440).

(*f*) The following is a form of discretionary trust in favour of the husband (compare the form given in note (*e*), *ante*, p. 343):—

"AND after the death of W. (*wife*) upon trust, if no event shall have happened whereby the same income or any part thereof if belonging absolutely to the said H. (*husband*) would have become payable to any other person, to pay the said income to him during his life or until any such event as is lastly hereinbefore mentioned shall happen; and after such event upon trust, during the remainder of his life to pay or apply the whole or any part of the said income, if and in such manner and at such times as the trustees or trustee shall in their or his discretion think fit, unto or for the benefit of all or any one or more of the persons following, namely, the said H. and his wife and issue, if any, for the time being living, and the persons or person for the time being beneficially interested under this settlement; and, subject thereto, the said income shall be held upon the trusts which would be applicable thereto if the said H. were dead."

PROVIDED ALWAYS, that any child [*hotchpot clause, as above, Precedent XL.* (B), p. 337]. Hotchpot clause.

AND IT IS HEREBY AGREED, that [*advancement clause, as above, Precedent XL.* (B), p. 337] (*g*). Advancement clause.

AND IT IS HEREBY AGREED that, if there should not be any child of the said intended marriage who attains a vested interest under the trust in default of appointment herein- Trusts in default of children.

(*g*) Here were formerly inserted powers as to the application of income for maintenance and as to accumulation of surplus income. These are generally omitted in reliance on section 43 of the Conv. Act 1881. The trusts after the deaths of the parents being expressed to extend to the income as well as the capital of the trusts funds, each infant child will be contingently entitled to the income of a share: see Elph. Introd. 452. The "maintenance and accumulation clauses" were in some such forms as the following:—

[AND THAT the trustees or trustee shall, after the death of the survivor of the said H. and W., apply the whole or such part as they or he in their or his discretion shall think fit of the income of the share in the said trust premises to which any child of the said now intended marriage shall for the time being be entitled in expectancy, under the trusts hereinbefore declared, for or towards his or her maintenance, education, or benefit, and may either themselves or himself so apply the same, or may pay the same to the guardian or guardians of such child for the purpose aforesaid without seeing to the application thereof;] Maintenance clause.

[AND SHALL, during such suspense of absolute vesting as aforesaid, accumulate the surplus (if any) of the same income at compound interest by investing the same and the resulting income thereof in any of the investments hereinbefore authorized, for the benefit of the person or persons who shall eventually become entitled to the principal fund from which the same shall have proceeded; and may apply the accumulations of any preceding year or years in or towards the maintenance or education of the child for the time being presumptively entitled thereto in the same manner as such accumulations might have been applied had they been income arising from the original trust fund in the then current year;] Accumulation clause.

before contained, then, subject to the trusts and powers hereinbefore contained,

As to husband's trust fund.

THE HUSBAND'S TRUST FUND, and the income and accumulations (if any) of the income thereof, or so much thereof as shall not have become vested or been applied under any of the trusts or powers affecting the same shall, after the death of the said W. and such failure of children as aforesaid, be held IN TRUST for the said H. absolutely:

As to wife's trust fund.

AND THE WIFE'S TRUST FUND and the income and accumulations (if any) of the income thereof, or so much thereof as shall not have become vested or been applied under any of the trusts or powers affecting the same shall, after the death of the said H. and such failure of children as aforesaid, be held in TRUST for such person or persons and for such purposes as the said W. shall, while discovert by deed revocable or irrevocable, or whether covert or discovert by will or codicil appoint; AND in default of and subject to any such appointment, if the said W. shall survive the said H., IN TRUST for the said W., her executors, administrators, and assigns, and so that during the said intended coverture such reversionary interest shall be her separate estate, but she shall not have power to dispose of or charge the same by way of anticipation; But if the said H. shall survive the said W., then IN TRUST for such person or persons as would have become entitled thereunto under the statutes for the distribution of the personal estate of intestates at the death of the said W., had she died possessed thereof intestate and without ever having been married, such persons, if more than one, to take as tenants in common in the shares in which they would have taken under the same statutes (*h*).

(*h*) A power should be added enabling the trustees to keep up the policy out of the trust property: see Elph. Conv. 418.

The following are forms of a covenant by the husband to keep up the settled policy and of a power to the trustees to keep it on foot out of the income or capital of the trust funds:—

"AND THE said H. (*husband*) doth hereby covenant with the said [*trustees*] that, if the said intended marriage shall take effect, he the said H. will at all times pay the said annual premium of £ —— and such other moneys (if any) as may become payable for keeping on foot the said policy, on the first day on which the same respectively ought to be paid, and will not do or knowingly suffer anything whereby the said policy may become void or voidable, or the trustees or trustee be hindered

Agreement to settle wife's other and after-acquired property.

AND IT IS HEREBY AGREED, and the said W. hereby covenants with the trustees hereinbefore named, that if, besides the trust funds hereinbefore settled by her, she should at the time of the said intended marriage be, or if at any time or times during the same coverture she should become entitled in any manner and for any estate or interest to any real or personal property of the value of £—— or upwards at one time, and from one and the same source (except jewels, trinkets, ornaments, furniture, plate, china, glass, pictures, prints, books, and other chattels passing by delivery and not being securities for money, which and also any property excepted from this covenant as not being of the value of £——, it is hereby agreed shall belong to her for her separate use absolutely), THEN and in every such case she and all other necessary parties will at the cost of the trust estate as soon as may be and to the satisfaction of the trustees or trustee, CONVEY such real or personal property to the trustees or trustee upon trust to sell, call in or convert into money, such part or parts thereof as shall not consist of money, or of an annuity or other real or personal property limited to or held in trust for her life only, or for a term of years determinable on her death, but with power for the trustees or trustee to postpone such sale, calling in, and conversion so long as they or he may think fit, and to retain investments transferred under this covenant, and dispose of the annual income thereof in like manner as the annual income of the Wife's Trust Fund, and so that any reversionary interest be not sold before it falls into possession, unless the trustees or trustee see special reason for sale:

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from receiving any of the moneys assured, or which might become payable under the same:

PROVIDED ALWAYS, that the trustees or trustee may, if they or he shall think fit, apply any part of the annual income, or, if that be insufficient, then any part of the capital of the said trust premises, in payment of the said annual premium or other the moneys (if any) which may become payable for keeping on foot the said policy:

PROVIDED NEVERTHELESS, that any neglect by the trustees or trustee so to apply any part of the said annual income or capital, or to enforce the covenants hereinbefore contained on the part of the said H. shall not be considered a breach of trust, and that the trustees or trustee shall not be in anywise responsible for such neglect, nor for the said policy becoming void by any means whatsoever.

And it is hereby agreed, that the trustees or trustee shall stand possessed of the money to arise from such sale, calling in, or conversion, and of any part of the said property received in money, upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the Wife's Trust Fund, or as near thereto as circumstances will permit, And upon trust to pay any annuity, or the income of any other real or personal property limited to or held in trust for the said W. for her life only or for any term of years determinable on her death, to her for her separate use without power of anticipation during any coverture, but with power for the trustees or trustee with her consent in writing at any time to sell the same, so that the money to arise from such sale be held and applied upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the Wife's Trust Fund, or as near thereto as circumstances will permit:

Proviso protecting trustees.

Provided always that the trustees or trustee shall not be made accountable in respect of any real or personal property becoming subject to the covenant to settle hereinbefore contained unless and until the same shall have been actually paid, conveyed, assigned, or transferred to them or him: nor shall they or he be chargeable with breach of trust or made liable in any way for not taking any proceedings to get in the same real or personal property or any part thereof, unless and until required in writing so to do by some person beneficially interested under these presents:

Power to appoint new trustees.

And it is hereby agreed that the said H. and W. during their joint lives, and the survivor of them during his or her life, shall have power to appoint new trustees of these presents.

In witness, &c. (*i*).

(*i*) The Conv. Act, 1881 (ss. 35, 38), implies in this settlement certain provisions ancillary to the exercise of any trust for, or power of, sale given by the settlement itself; power to adopt statutory conditions of sale (ss. 3, 66); to give receipts (s. 36); to compound and compromise (s. 37); and to appoint new trustees (s. 31); to apply income for maintenance (s. 43).

THE FIRST SCHEDULE ABOVE REFERRED TO.

[*List of investments transferred by husband.*]

THE SECOND SCHEDULE ABOVE REFERRED TO.

[*List of investments subject to the marriage settlement of wife's parents.*]

XLIII.

WILL.

I, J. S., [late of —— in the county of X., and now] of No. — Z. Street, in the parish of —— in the county of London, hereby REVOKE all former wills, codicils, and testamentary instruments made by me, and declare this to be my last will.

I appoint S. of, &c., and T. of, &c., to be the executors of this my will. Appointment of executors.

I BEQUEATH to —— my gold watch and chain; and to —— all other articles of personal or domestic or household use or ornament belonging to me; and to —— all my shares in the —— Company Limited. Specific legacies.

I BEQUEATH my leasehold messuage, with the outbuildings and stabling belonging thereto, situate and being No. — in Z. Street aforesaid, unto A. of, &c., his executors, administrators, and assigns, for all the residue which shall be unexpired at my decease of the term for which the same premises are holden, the said A., his executors, administrators, and assigns, paying the rent reserved by, and performing and observing at his and their own expense the covenants and conditions contained in the lease under which the said premises are holden, and keeping my general estate indemnified in respect thereof. Specific bequest of leasehold.

I DEVISE to B. of, &c., his heirs and assigns [*or*, "in fee-simple"], all my freehold messuage or tenement, with the outbuildings and lands belonging to or held with the same situate in —— in the county of ——, and commonly known as ——, now in the occupation of ——, with the appurtenances thereof. Specific devise.

I BEQUEATH the following LEGACIES [free of duty], namely, General legacies.

the sum of £—— to C. of, &c., the sum of £—— to D. of, &c., and the sum of £—— to E. of, &c.

Demonstrative legacy.

I BEQUEATH to F. of, &c., the sum of —— to be raised by the sale of a sufficient part of the £2 10s. per cent. Consolidated Stock now standing in my name, as the primary fund for the payment thereof; and in case I shall not at my decease be possessed of such stock or of a sufficient amount thereof, I direct that the said legacy, or so much thereof as the said stock shall be insufficient to pay, shall be paid out of my general personal estate.

Bequest of annuity.

I BEQUEATH (*a*) to G., the wife of J. H. of, &c., during her life an annuity of £—— [free of duty] for her separate use without power of anticipation, to commence from my death, and to be payable half-yearly on the —— day of —— and the —— day of —— in each year, the first payment, or an apportioned part thereof, from my death, to be made on such of the said days as shall happen next after my death.

General devise and bequest.

I DEVISE AND BEQUEATH all my real and personal estate (*b*), except what I otherwise dispose of by this my will or any codicil hereto, UNTO R. of, &c., his heirs, executors, administrators, and assigns, charged as to my real estate in aid of my personal estate with the payment of my funeral and testamentary expenses and debts, and the legacies and annuities bequeathed by this my will or any codicil hereto, and the duty on any legacies or annuities bequeathed free of duty.

Testimonium.

IN WITNESS whereof I, the said J. S., have to this my will set my hand this —— day of —— 19—,

(Signed) J. S.

Attestation clause.

SIGNED by the said testator as his last will in the presence of us, present at the same time, who in his presence and at his request and in the presence of each other have hereunto subscribed our names as witnesses.

[*Names, addresses and descriptions of two (or more) witnesses.*]

(*a*) As to annuities, see Elph. Conv. 570.
(*b*) See note (*a*) to Preced. XLIV., *post*, p. 351.

XLIV.

WILL *disposing of residuary Real and Personal* ESTATE *in* TRUST *for* CONVERSION, *and payment of Income to Wife for Life or Widowhood, with remainder in trust for Children.*

[*Commencement, appointment of wife A. and A. T. and B. T. executrix and executors, and the said A. T. and B. T. trustees of the will, specific legacies and devises, general legacies and annuities as in last Precedent.*]

Residuary devise and bequest.

I DEVISE AND BEQUEATH all the real and personal estate whatsoever to which at my death I shall be beneficially entitled or of which I shall have any general power to dispose beneficially by will (*a*) and not hereby otherwise disposed of, UNTO AND TO THE USE of the said A. T. and B. T., their heirs, executors, and administrators respectively, according to the nature thereof, upon the trusts and subject to the powers and provisions hereinafter declared and contained concerning the same, that is to say, UPON TRUST that the said A. T. and B. T., or other the trustees or trustee for the time being of this my will (hereinafter called my trustees), shall sell, call in, collect, and convert into money the said real and personal estate, at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession, unless it shall appear to my trustees that an earlier sale would be beneficial), and so that they shall have the fullest power and discretion to postpone the sale, calling in, or conversion of the whole or any part or parts of the said premises, including leaseholds or other property of a terminable or wearing-out nature, during such period as they shall think proper, without being responsible for loss.

Upon trust for sale and conversion,

with discretion to postpone sale, &c.

Trust of proceeds of conversion to pay debts, legacies, &c.

AND SHALL out of the moneys to arise from the sale, calling in, and conversion of, or forming part of my said real

(*a*) These words are not necessary, since by section 27 of the Wills Act, 1837, a general devise and bequest of the real and personal estate of the testator (as in Preced. XLIII. *supra*, p. 350), will operate to pass property over which he has a general power of appointment.

and personal estate, pay my funeral and testamentary expenses and debts, and the legacies bequeathed by this my will or any codicil hereto, and the duty on any legacies or annuities bequeathed free of duty, and make such provision as may be required or be deemed convenient for the payment of any annuities so bequeathed;

Trust for investment.

AND SHALL, at the discretion of my trustees, invest the residue of the said moneys in the names of my trustees in or upon [*name the investments to be authorised*]; AND may at their discretion vary or transpose such investments into or for others of any nature hereinbefore authorized;

Trust to pay income to widow during widowhood.

AND SHALL pay the income of my said residuary trust estate and investments (hereinafter called the Trust Fund) to my wife A. during her life;

Trust for testator's children or remoter issue as widow shall appoint.

AND AFTER her death shall stand possessed of the trust fund and the income thereof IN TRUST for all or such one or more exclusively of the others or other of my children or remoter issue (such remoter issue to be born and take vested interests within twenty-one years after the death of my said wife), at such age or time, or respective ages or times, if more than one, in such shares and with such future or other trusts for their respective benefit and such provisions for their respective advancement, either in the lifetime of my said wife or after her death, and maintenance and education, at the discretion of my trustees or any other person or persons, and in such manner in all respects as my said wife shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint:

In default of appointment, trust for testator's children who attain 21, &c.

AND IN DEFAULT of and subject to any such appointment as aforesaid, IN TRUST for all or any my children or child who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry, if more than one, in equal shares;

Hotchpot clause.

PROVIDED ALWAYS, and I declare that no child of mine who or whose issue shall take any part of the trust fund under any appointment by virtue of the power hereinbefore contained shall, in default of appointment to the contrary, be entitled to any share of the unappointed part of the trust fund without bringing the share or shares or interest appointed to him

or her or to his or her issue into hotchpot and accounting for the same accordingly (*b*).

Advancement clause.

I AUTHORIZE my trustees after the death of my said wife, or previously thereto with her consent in writing, to raise any part or parts, not exceeding in the whole a moiety, of the then expectant presumptive or vested share of any child or grandchild of mine in the trust fund under the trusts hereinbefore contained, and to pay or apply the same for the advancement or benefit of such child or grandchild in such manner as my trustees shall think fit.

Ultimate trust.

AND IN THE EVENT of the failure or determination of the trusts hereinbefore declared, and subject to the trusts, powers, and provisions hereinbefore declared and contained, or by law vested in my trustees, and to every or any exercise of such powers, my trustees shall hold the trust fund and the income thereof IN TRUST for my brothers, L., M., and N., and my sisters P., Q., and R., or such of my said brothers and sisters as shall be living at the time of the failure or determination of the trusts hereinbefore declared and the issue then living and attaining the age of twenty-one years, or in the case of females marrying, of any of my said brothers and sisters who may be then dead, their, his, or her heirs, executors, administrators, and assigns respectively in equal shares *per stirpes*.

Devise of trust and mortgage copyholds.

[I DEVISE to my executrix and executors, their heirs and assigns, all hereditaments of copyhold or customary tenure which may at my decease be vested in me as a trustee or mortgagee, and of which I may be tenant on the Court rolls of any manor or manors, subject to the trusts or equities affecting the same respectively (*c*)].

Appointment of guardians (*d*).

[I APPOINT the trustees or trustee for the time being of this my will to be the guardians or guardian of my infant children after the death of my said wife in default of her having appointed any such guardian or guardians, or in the event of her having made any such appointment, then after the death

(*b*) The "maintenance and accumulation" clauses are omitted in reliance on Conv. Act, 1881, s. 43. See *ante*, p. 345 (*g*), note.

(*c*) See Conv. Act, 1881, s. 30, as amended by section 45 of the Copyhold Act, 1894 (57 & 58 Vict. c. 46), which replaces section 88 of the Copyhold Act, 1887 (50 & 51 Vict. c. 73).

(*d*) See the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27).

or refusal to act of the person or all the persons so appointed by her.]

In witness, &c.

XLV.

Statutory declaration as to pedigree.

Declaration;

I, A. B. of ——, spinster, do solemnly and sincerely declare as follows:—

—as to marriage of declarant's parents;

1. I am — years of age, and am one of the children of the late C. B., of ——, by D. B. his wife, formerly D. K., spinster, who as I have been informed and believe, were married in the parish church of —— on the —— day of ——. The said C. B. and D. B. are the persons respectively referred to in the marriage certificate produced to me at the time of making this declaration, and marked ——.

—as to the children of the marriage;

2. I have always understood and believe that the said C. B. had three children and no more by the said D. B., namely, two sons, named respectively E. B. and F. B., and one daughter, being myself.

—that one of such children has not been heard of for many years and is believed to have died a bachelor and intestate;

3. The said E. B. was, as I have always understood, born at —— on the —— day of ——. In the year 18—, he sailed for ——, in the ship —— from ——, since which time no tidings of him have ever been received by any of his family, and I verily believe him to be dead, and that he died a bachelor and intestate.

—as to the death in infancy and unmarried of another of such children.

4. I have been informed and believe that the said F. B. was born on the —— day of —— and died at the age of (eighteen) years, and without having been married. The said F. B. is the person of that name mentioned in the certificates of baptism and burial now produced and shown to me, and marked —— and —— respectively.

And I make this declaration, conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Declared at, &c.

PART II.

I.

Feoffment (*a*).

THIS INDENTURE of three parts, made this first day of February, in the year of our Lord 1799, and in the 39th year of the reign of our sovereign lord George the Third, by the grace of God, &c. Parties.

Between A. of, &c. [*feoffor*], of the first part, B. of, &c. [*feoffee*], of the second part, and C. of, &c. [*attorney to deliver seisin*] of the third part:

Witnesseth that, in consideration of the sum of £—— of lawful money of Great Britain to the said A. in hand paid by the said B. at or before the sealing and delivery of these presents, the receipt of which said sum of £—— he the said A. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release and discharge the said B., his heirs, executors, administrators, and assigns, and every of them for ever by these presents; He the said A. hath granted, aliened, enfeoffed, and confirmed, and by these presents doth grant, alien, enfeoff, and confirm unto the said B., his heirs and assigns, Witnesseth. Consideration. Receipt. Operative words.

All those [*parcels*], Parcels.

And also all woods and underwoods, timber, and other trees, mounds, hedges, ditches, fences, ways, paths, passages, water, watercourses, easements, advantages, and appurtenances to the said pieces or parcels of land and hereditaments, or any of them, or any part thereof, belong- General words.

(*a*) This form is adapted from precedents in the second volume of Sanders on Uses. It has been thought desirable to retain the verbiage as an example of the older style of conveyancing. As to feoffments, see Elph. Conv. 90.

ing or in any wise appertaining, or to or with the same or any of them, or any part thereof, now or at any time heretofore usually held, occupied, or enjoyed or accepted, deemed, taken, or known as part, parcel, or member thereof;

All the estate.

And all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said A. in, to, or out of the same and every part thereof:

Habendum.

To have and to hold the said pieces or parcels of land, hereditaments, and other the premises hereby granted and enfeoffed, or intended so to be, with the appurtenances, unto the said B., his heirs and assigns, to the only use and behoof of the said B., his heirs and assigns for ever; And the said A. hath granted for himself, his heirs, executors, administrators, and assigns, that he the said A. and his heirs, all and every the said lands, hereditaments, and premises above, granted and enfeoffed, or intended so to be, unto the said B., his heirs and assigns, against him the said A., his heirs and assigns, and against all and every other person or persons whomsoever, shall and will warrant and for ever defend by these presents:

General warranty.

Letter of attorney.

And the said A. hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint the said C. his true and lawful attorney for him and in his name and stead to enter into and take full, quiet and peaceful possession and seisin of all and singular the above-mentioned premises, or some part thereof in the name of the whole, and then to deliver full, quiet and peaceful possession and seisin of all and singular the premises, or some part thereof in the name of the whole, unto the said B., or to his attorney in that behalf lawfully authorized, according to the form and effect and true intent and meaning of these presents.

In witness, &c.

Memorandum of Livery of Seisin (*endorsed on Deed of Feoffment*).

Be it remembered that on this —— day of ——, in the year first within written, full and peaceful possession and seisin were had and taken by the within-named C. of the

lands and hereditaments within mentioned to be granted and enfeoffed, and were in the name of the within-mentioned A. delivered by the said C. to the within-mentioned B.,

To HOLD the same unto the said B., his heirs and assigns, for ever, according to the form and effect and true intent and meaning of the within-written indenture in the presence of ——.

II.

A FINE *of* LANDS SUR COGNIZANCE DE DROIT COME CEO, &c. (*a*).

(1). *Writ of Covenant; or Præcipe.*

GEORGE the Second, by the Grace of God, of Great Britain, France and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting.

COMMAND Abraham Barker, esquire, and Cecilia, his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of (*b*) two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices at Westminster, from the day of St. Michael in one month, to shew wherefore they have not done it: and have you there the summoners, and this writ.

WITNESS ourselves at Westminster the ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution. } John Doe. Richard Roe.

Sheriff's return.

Summoners of the within-named Abraham, Cecilia, and John. } John Den. Richard Fen.

(*a*) These forms are taken from Blackstone's Commentaries, Vol. 2, Appendix IV.

(*b*) The parcels in a fine were usually stated in round numbers, the specific description with the true quantities appearing in the deed leading or declaring the uses; see Coventry on Conveyancers' Evidence, 74.

(2.) *The Licence to Agree.*

Norfolk, to wit. } David Edwards, esquire, gives to the lord the king ten marks for licence to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale.

(3.) *The Concord.*

And the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift, of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted, for themselves and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

(4.) *The Note of Abstract.*

Norfolk, to wit. } Between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them; to wit, that the said Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia and John; and those they have remised and quitted claim, from them and their heirs, to the afore-

said David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

(5.) *The Foot, Chirograph, or Indentures of the fine.*

Norfolk, } THIS IS THE FINAL AGREEMENT made in the court
to wit. } of the lord the king at Westminster, from the day of Saint Michael in one month, in the twenty-first year of the reign of the lord George the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs, for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

III.

A Common Recovery (*a*) *of* Lands *with* (*b*) Double Voucher.

(1.) *Writ of Entry sur Disseisin in the Post; or Praecipe.*

George the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting.

Command David Edwards, esquire, that, justly and without delay, he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances (*c*), in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of Saint Martin, to show wherefore he hath not done it: and have you there the summoners, and this writ.

Witness ourself at Westminster, the twenty-ninth day of October, in the twenty-first year of our reign.

Sheriff's return.

Pledges of prosecution. } John Doe. Richard Roe.

Summoners of the within-named David. } John Den. Richard Fen.

(2.) *Exemplification of the Recovery Roll.*

George the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so

(*a*) These Forms are taken from Blackstone, ***ubi supra***.

(*b*) Note, that, if the recovery be had with single voucher, the parts marked " —— " in (2) are omitted.

(*c*) As to the parcels, the observations, *supra*, p. 357, note (*b*), are applicable.

forth, to all to whom these our present letters shall come, greeting.

KNOW YE, that among the pleas of land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of Saint Michael in the twenty-first year of our reign, upon the fifty-second roll it is thus contained:

ENTRY returnable on the octave of Saint Martin.

NORFOLK, to wit: Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin which Hugh Hunt thereof justly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [(*d*) of six shillings and eight pence, and more, in rents, corn and grass]: and into which [the said David hath not entry, unless as aforesaid]: and thereupon he bringeth suit [and good proof]. AND the said David in his proper person comes and defendeth his right when [and where it shall behove him], and thereupon voucheth to warranty "John Barker, esquire; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances to him freely warranteth [and prays that the said Francis may count against him]. AND hereupon the said Francis demandeth against the said John, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that

Demand against the tenant.

Count.

Esplees.

Defence of the tenant.

Voucher.

"Warranty.

"Demand

"against the

"vouchee.

"Count.

(*d*) The clauses between brackets are represented in the record by "&c."

now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c. And the aforesaid John, tenant by his own warranty, defends his right, when, &c., and thereupon he further voucheth to warranty " Jacob Morland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, &c. And hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon he saith, that he himself was seised of the tenements aforesaid with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c. And the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c. And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose: and of this he puts himself upon the country. And the aforesaid Francis thereupon craveth leave to imparl: and he hath it. And afterwards the aforesaid Francis cometh again here into court, in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default.

"Defence of "the vouchee.

"Second "voucher."

Warranty.

Demand against the common vouchee.

Count.

Defence of the common vouchee.

Plea, *nul disseisin.*

Imparlance.

Default of the common vouchee.

Therefore it is considered, that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances: and that the said David have of the land of the aforesaid " John, to the value [of the tenements aforesaid]; and further that, the said John have of the land of the said " Jacob to the value of the tenements aforesaid]. And the said Jacob in mercy. And hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid, with the appurtenances: and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty-eighth day of November in this same term, here

Judgment for the demandant.

Recovery in value.

Amercement.

Award of the writ of seisin, and return.

cometh the said Francis in his proper person; and the sheriff, namely, Sir Charles Thompson, knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid with the appurtenances, as he was commanded.

ALL AND SINGULAR which premises, at the request of the said Francis, by the tenor of these presents, we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the Bench aforesaid, to be affixed to these presents. Exemplification continued.

WITNESS Sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign. *Teste.*

COOKE.

IV.

CONVEYANCE *by* LEASE AND RELEASE.

(1). *Lease or* BARGAIN AND SALE *for a year.*

THIS INDENTURE, made the first day of July, 18—,

BETWEEN A. V., of, &c. [*vendor*], of the one part, and J. P. of, &c. [*purchaser*], of the other part: Parties.

WITNESSETH, that in consideration of five shillings now paid by the said J. P. to the said A. V. (the receipt whereof is hereby acknowledged), the said A. V. HATH bargained and sold, and by these presents doth BARGAIN and SELL unto the said J. P., Witnesseth. Bargain and sale.

ALL THAT [*parcels, followed by general words, but without "All the estate" clause*].

TO HAVE AND TO HOLD the same unto the said J. P., his executors, administrators, and assigns, from the day next before the day of the date of these presents for the term of one whole year then next ensuing, Habendum, for one year

YIELDING AND PAYING therefor to the said A. V., his heirs and assigns, the yearly rent of one peppercorn at the

expiration of the said term if the same shall be lawfully demanded:

To THE INTENT and purpose that by virtue of these presents, and of the statute for transferring uses into possession, the said J. P. may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises to him, his heirs and assigns, to the uses and upon the trusts thereof to be declared by another indenture intended to bear date the next day after the day of the date hereof.

IN WITNESS, &c.

(2.) *Deed of* RELEASE *to* USES *to* BAR DOWER.

THIS INDENTURE, made the 2nd day of July, 18—,

Parties. BETWEEN A. V. of, &c. [*vendor*], of the one part, J. P. of, &c. [*purchaser*], of the second part, and D. T. of, &c. [*dower trustee*], of the third part:

Recitals of lease and release. WHEREAS by indentures of lease and release respectively made on the 1st and 2nd days of May, 18—, between W. M. of the one part, and the said A. V. of the other part, the hereditaments hereinafter expressed to be hereby granted and released were assured to the use of the said A. V., his heirs and assigns:

Of contract for sale. AND WHEREAS [*contract for sale by A. V. to J. P.*]:

Witnesseth. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract for sale, and in consideration of £1,000 to the said A. V. now paid by the said J. P. (the receipt whereof the said A. V. doth hereby acknowledge), HE the

Operative words. said A. V. HATH GRANTED, RELEASED, AND CONFIRMED, and by these presents DOTH GRANT, RELEASE AND CONFIRM unto the said J. P. (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said A. V. in consideration of five shillings by an indenture bearing date the day next before the day of the date of these presents for the term of one year from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession),

ALL THAT [*parcels, general words: All the estate clause*].

TO HAVE AND TO HOLD the said hereditaments UNTO the said J. P. and his heirs, Habendum.

TO SUCH USES, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations as the said J. P. shall from time to time by any deed or deeds, instrument or instruments in writing, limit or appoint; And in default of and subject to any such limitation or appointment, TO THE USE of the said J. P. and his assigns during his life; AND from and after the determination of that estate by forfeiture or otherwise in his lifetime TO THE USE of the said D. T. and his heirs during the life of the said J. P., IN TRUST for the said J. P. and his assigns; AND after the decease of the said J. P. TO THE USE of the said J. P., his heirs and assigns [*covenants for title by A. V.*]. To uses to bar dower.

IN WITNESS, &c.

V.

RELEASE *in fee, under the Act 4 Vict. c. 21.*

THIS INDENTURE, made the 1st day of January, 1843, in pursuance of an Act of Parliament passed in the fourth year of the reign of her present Majesty and intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates by the same parties."

BETWEEN V. of, &c. [*vendor*], of the one part, and P. of, &c. [*purchaser*], of the other part: Parties.

WHEREAS [*recite contract for sale by V. to P.*] Recital of contract for sale.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration, &c. (the receipt, &c.), HE the said V. HATH granted, bargained, sold, aliened, released, and confirmed, AND by these presents DOTH grant, bargain, sell, alien, release, and confirm UNTO the said P. and his heirs, Witnesseth. Operative words.

ALL THOSE [*parcels, general words, and all the estate clause*],

Habendum. TO HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and other the premises hereby granted and released, or intended so to be, with their appurtenances UNTO AND TO THE USE of the said P., his heirs and assigns, for ever [*covenants by V. for title*].

IN WITNESS, &c.

VI.

COVENANT *to* STAND SEISED.

THIS INDENTURE, made the —— day of ——, 18—,

Parties. BETWEEN J. S. of, &c. [*covenanter*], of the one part, and F. S. of, &c. [*covenantee*], the father of the said J. S., of the other part:

Witnesseth. WITNESSETH that the said J. S., in consideration of the natural love and affection which the said J. S. hath and beareth for the said F. S., his said father, DOTH for himself

Operative words. and his heirs, COVENANT and grant, with and to the said F. S. and his heirs, that he the said J. S. and his heirs, will and shall henceforth stand and be seised of and in

ALL THAT the manor and lordship of X. in the county of Y., and all other lands and hereditaments whatsoever, of him the said J. S. in X. aforesaid, and all other his hereditaments whatsoever whereof he the said J. S. now is or standeth seised of and in an estate of fee-simple with their and every of their rights, members, and actual or reputed appurtenances, TO THE USE of him the said J. S. and the heirs male of his body lawfully begotten; AND for default of such issue, TO THE USE of the said F. S. and the heirs male of his body lawfully begotten: AND for default of such issue, TO THE USE of the right heirs of him the said J. S. for ever.

IN WITNESS, &c.

PART III.

FORMS OF TRANSFER AND CHARGE UNDER THE LAND TRANSFER RULES, 1903.

I.

FORM 20.—*Instrument of Transfer of Land.* (*Rule* 126.)

LAND REGISTRY.

Land Transfer Acts 1875 and 1897.

District.....
Parish.....
No. of Title.....

(*Date.*) In consideration of —— pounds (£ ——) I, A. B., of &c., hereby transfer to C. D., of, &c., the land comprised in the title above referred to.

Signed, sealed, and delivered by the said A. B., in the presence of E. F., of &c. } (*Signature of A.B.*) (Seal.)

Note.—Where the transfer is made under section 9, subsection 6, of the Act of 1897, and deals with part only of the land comprised in a title, or is made under Rule 96, the number of the title must be left blank, and instead of the words " the title above referred to " a reference to the last preceding document of title containing a description of the land must be inserted.

When the consideration is advanced by different persons in separate sums, or does not consist, or wholly consist, of money, its nature, or the separate payments made, may be concisely stated.

When the transfer is to two or more jointly, no addition need be made to the form.

Where it is to two or more as tenants in common, one of the following forms may be used: "to C. D. and E. F. in equal shares," to C. D. four-fifths, and to E. F. one-fifth of," and so on, where the transferor retains a share, add the words "and I the said A. B. retain —— share *or* shares."

The amount of the consideration should be stated in words, and repeated in figures—as, for instance, "three hundred and seventy pounds (£370)."

II.

FORM 44. *Instrument of Charge. Rule* 158.)

(Heading as in Form 20.)

(*Date.*) In consideration of —— pounds (£ ——) I, A. B., of &c., hereby charge the land comprised in the title above referred to with the payment to C. D., of &c., on the —— of ——, 19—, of the principal sum of £——, with interest at —— per cent. per annum, payable [half yearly, quarterly] on the —— of ——, &c. in every year.

(To be executed as Form 20.)

Note.—Where the charge is made under section 9, sub-section 6, of the Act of 1897, and deals with part only of the land comprised in a title, or is made under Rule 96, the number of the title must be left blank, and instead of the words "the title above referred to" a reference to the last preceding document of title containing a description of the land must be inserted.

Where the consideration is advanced by different persons in separate sums or does not consist, or wholly consist, of money, its nature, or the separate payments made, may be concisely stated.

The amount of the consideration should be stated in words, and repeated in figures—as, for instance, "three hundred and seventy pounds (£370)."

Where the charge is to two or more jointly, no addition need be made to the form.

Where the money is to be held in separate shares, the following variation may be used:—

After "payment to" insert "C. D., of &c., and E. F., of, &c., on the —— of ——, 19—, of the respective principal sums of —— and —— with interest," &c., as in the above form.

Any of the following special stipulations may also be added at the end of the charge.

A.—*Stipulations negativing the Covenants implied in charges by sections* 23 *and* 24 *of the Act of* 1875.

(1.) No covenant is hereby implied to pay the principal or interest secured by the charge.

(2.) No covenant is hereby implied as to payment of rent or performance or observance of the covenants or conditions of the registered lease, or as to indemnity in respect thereof.

B.—*Stipulations in charges excluding the provisions of sections* 25 *to* 27 *of the Act of* 1875, *and altering the priority of charges under section* 28 *of the same Act.*

(1.) The creditor shall have no power to enter on the land.

(2.) The creditor shall have no power to enforce foreclosure or sale of the land.

(3.) The creditor shall have no power of sale.

(4.) The creditor may exercise the power of sale without notice.

(5.) This charge shall rank *pari passu* with a charge of even date to —— of —— to secure —— *or* shall be the [first, second, third, &c., *as the case may be*] in order of priority of three charges of even date, one of which is to —— of —— to secure ——, another is to —— of —— to secure ——, and the other is this charge *or* shall have priority to a charge dated, &c., registered, &c., in favour of A.B. of, &c., for —— (*or otherwise as the case may be*).

C.—*Miscellaneous Stipulations.*

(1.) The interest to be secured by the charge shall be reduced to —— per cent. in every (half-year, quarter, &c.) in which it is paid within —— days after it becomes due.

(2.) None of the principal secured by the charge shall be called in till the —— of —— 19—, unless the interest shall fail to be paid within —— days after it becomes due.

(3.) None of the principal secured by the charge shall be paid off till the —— of —— 19—, unless the proprietor of the charge shall be willing to accept it.

(4.) If the interest secured by the charge shall be paid within —— days after it becomes due the principal shall be payable by instalments of —— each, to be paid on the —— of —— and the —— of —— in every year, the first of such instalments to be paid on the —— of —— 19—.

Provided that on failure of payment of any instalment within —— days after it becomes due, the whole of the principal remaining owing on the said security shall become payable at once.

Provided nevertheless that the whole or any part (not less than —— at any one time) of the above mentioned principal may be paid off on giving one calendar month's notice in writing of the intention to do so, and on paying up all arrears of interest that may be due at the time of such payment of principal.

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